No. 8115

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8115

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

Index

Index

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

MESSRS. MURPHY & WHITLOCK,
of Missoula, Montana.
MR. J. C. GARLINGTON,
of Missoula, Montana.
MR. R. F. GAINES,
of Butte, Montana.
Attorneys for Appellant and Defendant.

MR. H. LOWNDES MAURY,
of Butte, Montana.
MR. T. J. DAVIS,
of Butte, Montana.
MR. L. C. MYERS,
of Butte, Montana.
Attorneys for Appellee and Plaintiff. [1*]

---

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 1622.

CLIFFORD GILBERT, by and through his guardian ad litem, James D. Gilbert,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

BE IT REMEMBERED, that on April 23rd, 1934, the Complaint was filed herein, in the words and figures following, to wit: [2]

[Title of Court and Cause.]

COMPLAINT AT LAW.

Comes now the above named plaintiff and for a first count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in interstate commerce, owning, operating, and con-

trolling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge, in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and [3] said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in interstate commerce, to-wit: he was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, and debris resulting from a fire upon the premises of said defendant in Deer Lodge,

Montana, which said fire happened upon said premises on or about 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to [4] the date aforesaid, carelessly and negligently failed to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned,

with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished him was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially [5] when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn and the ratchets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, and sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of

pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such [6] a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately ⅜ of an inch thick, 3½ inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cool-

ing of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of [7] water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, and dump body, as aforesaid, and for a long period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, [8] dump body, engine, valves, pistons, and fan, as hereinbefore alleged, and said defendant had notice and knowledge of said defects, as aforesaid, and the unsafe and dangerous condition of the truck, dump body, engine, valves, and fan, or in the exercise of ordinary care and

caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck dump body, engine, ignition and cooling systems, and fan in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant negligently failed and neglected to make any repairs whatever to said truck, engine, ignition and cooling systems, and fan while in its service, and the same were continued in service in such unsafe and dangerous condition aforesaid for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said

premises, which said point was approximately one [9] hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed in said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump

truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or [10] pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan ⅜ of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and

against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [11]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hardworking young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Mon-

tana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [12]

Comes now the above named plaintiff and for a second count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in interstate commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of

Powell and near the City of Deer Lodge in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in interstate commerce, to wit: he was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, and [13] debris resulting from a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, sup-

plies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to the date aforesaid, carelessly and negligently failed to inspect and to examine the condition of and to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished by defendant to him was not inspected and was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to [14] the plates or body of metal enclos-

ing it, to such an extent as to permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain

level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn, and the ratchets holding the lever control in an open or [15] closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective

in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of mental flanges or blades approximately ⅜ of an inch thick, 3½ inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, [16] bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and

which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerkings of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, [17] insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that

said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, dump body, and cooling and ignition systems as aforesaid, and for a like period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, dump body, engine, valves, pistons, fan, and ignition and cooling systems, as hereinbefore alleged, and the unsafe and dangerous condition of the truck, dump body, engine, and fan, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and

to have put the truck dump body, engine, ignition and cooling systems, and fan in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant carelessly and negligently failed and neglected to inspect or to [18] examine the condition of, or to make any examination of, or any repairs whatever to said truck, engine, ignition and cooling systems, and fan, while in its service, and the same were continued in service in such unsafe and dangerous condition because of the failure of the said defendant to examine or to inspect said truck, engine, ignition and cooling systems, valves, pistons, and fan, as it was the duty of the said defendant then and there to do as aforesaid, for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to inspect and to examine the condition of and to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies and debris resulting from a fire which had destroyed certain parts of the premises

of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed by said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said [19] motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the

unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several [20] pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately

seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [21]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hard working young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had

earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [22]

Comes now the above named plaintiff and for a third count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in intrastate commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire, from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge, in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in intra-state commerce, to-wit: He was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, [23] and debris resulting from a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and

upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to the date aforesaid, carelessly and negligently failed to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished him was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to [24] permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss

of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn and the ratchets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too [25] long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, and sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately ⅜ of an inch thick, 3½ inches wide, and

8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, bent, and broken; numerous pieces having been [26] broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as

herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine, as herein alleged; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced. [27]

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, valves, pistons, ignition and cooling systems, and dump body, as aforesaid, and for a long period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, dump body, fan, valves, pistons, ignition and cooling systems, as hereinbefore alleged, and said defendant had notice and knowledge of said defects, as aforesaid, and the unsafe and dangerous condition of the truck, dump body, valves, pistons, fan, and ignition and cooling systems, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck, dump body, engine, valves, pistons, fan, and ignition and cooling systems in a reasonably safe condition for use by [28] plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant negligently failed and neglected to make any repairs whatever to said truck, engine, valves, pistons, fan, and ignition and cooling systems while in its service, and the same were continued in service in such unsafe and dangerous condition aforesaid for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to pro-

vide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock, A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed in said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking

and vibrating to such a marked degree that it was impossible for [29] plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine; particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or cup or pet cock or cup for the purpose of adjusting the flow of gasoline through

said priming cock or cup or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades [30] of said fan ⅜ of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and

useless to this plaintiff in his regular employment. [31]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, *hardwork* young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin, and the amount involved in this action

at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [32]

Comes now the above named plaintiff and for a fourth count and cause of action against the above named defendant complains and alleges as follows, to-wit:—

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in intra-state commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago, in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed,

by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in intra-state commerce, to-wit: he was on said day employed in driving an automobile gasoline [33] motor dump truck, used for hauling materials, supplies, equipment, and debris resulting *for* a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all

of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to the date aforesaid, carelessly and negligently failed to inspect and to examine the condition of and to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished by defendant was not inspected and was worn, old, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that: [34]

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to permit the oil to escape by

and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof could raise to certain level and re-

main there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the [35] truck to the release valve of the lifting cylinders was old and worn, and the rachets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective

in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately ⅜ of an inch thick, 3½ [36] inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystalized, were cracked, warped, bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary

to provide a circulation of air for the purpose of cooling the engine of said motor truck .

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, [37] became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without

being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence, and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, dump body, valves, pistons, and ignition and cooling systems as aforesaid, and for a like period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, dump body, engine, valves, pistons, fan, and ignition and cooling systems, as hereinbefore alleged, and the unsafe and dangerous condition of the truck, dump body, engine, fan, ignition and cooling systems, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck, dump body, engine, ignition and cooling [38] systems, and fan

in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant carelessly and negligently failed and neglected to inspect or to examine the condition of, or to make any examination of, or any repairs whatever to said truck, engine, ignition and cooling systems, and fan, while in its service, and the same were continued in service in such unsafe and dangerous condition because of the failure of the said defendant to examine or to inspect said truck, engine, ignition and cooling systems, valves, pistons, and fan, as it was the duty of the said defendant then and there to do as aforesaid, for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to inspect and to examine the condition of and to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of said defendant, was compelled to stop said motor dump truck at

a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed by said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff [39] at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said

motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of [40] said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and ad-

justing said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [41]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hard working young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humili-

ation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [42]

WHEREFORE, PLAINTIFF, Clifford Gilbert, prays for only one judgment against the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), and for his costs herein expended, and for such other and further relief as to the Court may seem meet and proper in the premises.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff,
Clifford Gilbert. [43]

District of Montana,
County of Silver Bow—ss.

JAMES D. GILBERT, being first duly sworn, on his oath deposes and says:

That he is the duly appointed, qualified, and acting guardian ad litem of Clifford Gilbert, the plaintiff in the above-entitled action, and makes this verification as such guardian ad litem; that he has read the above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge.

JAMES D. GILBERT

Subscribed and sworn to before me this 20th day of April A. D. 1934.

[Notarial Seal] THOMAS J. DAVIS
Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Oct. 8, 1934.

[Endorsed]: Filed April 23, 1934. C. R. Garlow, Clerk. [44]

Thereafter, on May 10, 1934, Demurrer to Complaint was filed herein, in the words and figures following, to wit: [45]

[Title of Court and Cause.]

DEMURRER

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff filed therein, upon the grounds and for the reasons:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a first cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

III.

The defendant demurs particularly to that portion of [46] the plaintiff's complaint set out as a second count and cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

IV.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a third count and cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

V.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a fourth count and cause of action, upon the ground and for the reason that the same does not state facts suffi-

cient to constitute a cause of action against the defendant.

R. F. GAINES
Butte, Montana,
MURPHY & WHITLOCK
Missoula, Montana,
Attorneys for Defendant.

Service of the foregoing Demurrer accepted and receipt of copy acknowledged, this 10th day of May, 1934.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed May 10, 1934. C. R. Garlow, Clerk. [47]

Thereafter, on July 21st, 1934, Order Overruling Demurrer was entered herein, in the words and figures following, to wit:

[Title of Court and Cause.]

The within demurrer coming on regularly to be heard and having been submitted without argument or briefs, and the court having considered the said demurrer, and being duly advised, and good cause appearing therefor, it is hereby overruled, with 20 days to answer, according to request and stipulation, upon receipt of notice hereof.

Dated July 21, 1934.

CHARLES N. PRAY,
Judge. [48]

Thereafter, on July 30, 1934, ANSWER, as amended, was duly filed herein, in the words and figures following, to wit: [49]

[Title of Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and for answer to the complaint of the plaintiff filed therein admits, denies and alleges:

Answering plaintiff's first count:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line or railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said first count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at [50] or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana, and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own neg-

ligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter. [51]

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of first count of the plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's second count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line or railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said second count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3. [52]

IV.

Admits that plaintiff's work was driving a truck. which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with

the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6. [53]

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of second count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's third count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois

to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said third count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred [54] to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said

truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. De- [55] nies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of third count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's fourth count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said fourth count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this [56] connection the defendant alleges that the truck which the plaintiff was driving at said time

belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of fourth [57] count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

FOR A FURTHER ANSWER AND FIRST SEPARATE DEFENSE TO THE PLAINTIFF'S COMPLAINT AND TO EACH AND ALL OF THE ALLEGED COUNTS AND CAUSES OF ACTION THEREIN CONTAINED, THE DEFENDANT ALLEGES:

I.

That it is and at all times referred to in plaintiff's complaint was a Wisconsin corporation, the owner of and engaged in operating a line of railroad extending from Chicago, Illinois to Puget Sound in the State of Washington, and passing through the intervening states, including Montana, which line of railroad was and is used in the transportation of persons and property. That in connection with its said railroad, the defendant maintained and still maintains certain shops at Deer Lodge, Powell County, Montana. That in the fall of 1933 a fire occurred which burned certain property at the said shops and it became necessary to clean up certain debris resulting therefrom.

II.

That in and about the said work there was used a certain Mack truck, which was furnished and provided by the City of Deer Lodge, Montana, and

which was owned by said municipality. That the plaintiff herein who was an experienced truck driver and who had for many months prior thereto driven said truck so furnished by the City of Deer Lodge was employed by the defendant as the driver of said truck. That the said plaintiff while operating said truck negligently and carelessly and while assuming to make some examination of and about the motor of said truck, sustained injury to certain of his fingers. That at said time and at all [58] times while plaintiff was operating said truck, he well knew and understood the construction, mechanism and condition of the same and well knew and understood the method of operating the same and had had long experience in driving, and operating of the particular truck in question and well knew and understood the nature and character of the work he was doing and each and all of the circumstances and conditions surrounding his work and the operation of said truck at said time and place, and that he knew and appreciated all of the risks and dangers arising or likely to arise in the course of his work and in and about the operation of said truck. That each and all of said surrounding circumstances and conditions and the dangers and risks incident to said work were open and obvious to him and should have been known and appreciated by him as a reasonable person. And this defendant alleges that such injury as he sustained at said time resulted from causes, the risk of injury from which he assumed.

FOR A FURTHER ANSWER AND SECOND SEPARATE DEFENSE TO THE PLAINTIFF'S COMPLAINT AND TO EACH AND ALL OF THE ALLEGED COUNTS AND CAUSES OF ACTION SET FORTH THEREIN ALLEGES:

I.

That it is and at all times referred to in plaintiff's complaint was a Wisconsin corporation, the owner of and engaged in operating a line of railroad extending from Chicago, Illinois to Puget Sound in the State of Washington, and passing through the intervening states, including Montana, which line of railroad was and is used in the transportation of person and property. That in connection with its said railroad, the defendant maintained and still maintains certain shops at Deer Lodge, Powell County, Montana. That in the fall of 1933 a fire occurred which burned certain property at the said shops and it became necessary to clean up certain debris [59] resulting therefrom.

II.

That in and about the said work there was used a certain Mack truck, which was furnished and provided by the City of Deer Lodge, Montana, and which was owned by said municipality. That the plaintiff herein who was an experienced truck driver and who had for many months prior thereto driven said truck so furnished by the City of Deer Lodge was employed by the defendant as the driver of said

truck. That while operating said truck the plaintiff of his own volition and without the knowledge of, or any suggestion or direction from the defendant, assumed to make some examination of and about the engine of said truck and negligently and carelessly and without any necessity requiring him so to do, brought his hand into contact with the fan or some other moving part of the truck and negligently and carelessly failed to keep his hand at a safe distance from said moving parts as he could have done. That the said fan and such moving parts were so located that there was no necessity whatsoever of plaintiff coming near or in contact with the same, and that the plaintiff so negligently and carelessly and without exercising any care whatsoever for his own safety, came in contact with said fan or other moving parts of said motor and sustained injury to certain of his fingers. And this defendant alleges that such injury resulted from the plaintiff's own negligence and not otherwise. [60]

[Amendment allowed and filed Sept. 27, 1935. C. R. Garlow, Clerk.]

For a further and separate answer to the complaint of plaintiff herein, defendant alleges that it is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, is a common carrier engaged in interstate and intrastate commerce in the states of Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Montana,

Idaho and Washington, among others; and further alleges that on June 29, 1935, in a proceeding brought in the District Court of the United States, for the Northern District of Illinois, Eastern Division, entitled "In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, and numbered 60463 in the files of the Clerk of said Court, the defendant herein filed a verified petition pursuant to Section 77 of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1, 1898, and the acts amendatory thereof and supplementary thereto; that pursuant thereto and on that same date the aforementioned District Court of the United States by its Order No. 1 in said proceedings, ordered that said petition be, and the same was thereby approved as properly filed under Section 77 of said act; by paragraph 5 of said order the defendant herein was and now is authorized and empowered, among other things, to defend any claim, demand or cause of action, whether or not suit or other proceedings to enforce the same had been brought in any court or tribunal; that by paragraph 10 thereof all persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, were thereby and now are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, or enforcing liens upon or in any manner whatsoever disturbing any portion of the assets,

goods, money, railroads, properties or premises belonging to or in possession of the defendant herein. [61]

WHEREFORE, having fully answered, the defendant prays to be dismissed with its costs herein expended.

MURPHY & WHITLOCK,
Missoula, Montana.
Attorneys for Defendant. [62]

State of Montana,
County of Missoula—ss.

A. N. Whitlock being first duly sworn on oath deposes and says; that he is one of the attorneys for the defendant named in the above entitled action, and makes this verification for and on behalf of said defendant for the reason that it is a corporation and has no officer within the county where affiant resides; that he has read the foregoing answer, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

A. N. WHITLOCK.

Subscribed and sworn to before me this 27th day of July, 1934.

[Seal] HOWARD TOOLE
Notary Public for the State of Montana residing at Missoula, Montana; my commission expires Jan. 30, 1936. [63]

State of Montana,
County of Missoula—ss.

Lillian A. Smith, being first duly sworn upon her oath, deposes and says: that she is of legal age and in no way interested in the foregoing action; that Murphy & Whitlock, attorneys for the defendant in the foregoing action, reside and have their offices at Missoula, and that T. J. Davis, Esq., and W. L. Emerson, Esq., attorneys for the plaintiff therein, reside and have their offices at Butte, Silver Bow County, Montana; that there is regular communication by mail between said cities. That on the 27th day of July, 1934 she served the foregoing answer of the defendant in said action upon T. J. Davis, one of the attorneys for the plaintiff by depositing in the United States Postoffice at Missoula, Montana a sealed envelope bearing the necessary postage, addressed to T. J. Davis, Attorney at Law, Butte, Montana and containing a full, true and correct copy of said Answer.

LILLIAN A. SMITH.

Subscribed and sworn to before me this 27th day of July, 1934.

[Seal] HOWARD TOOLE
Notary Public for the State of Montana, residing at Missoula, Montana. My commission expires Jan. 30, 1936.

[Endorsed]: Filed July 30, 1934. C. R. Garlow, Clerk. [64]

Thereafter, on August 17th, 1934, Reply was duly filed herein, in the words and figures following, to wit: [65]

[Title of Court and Cause.]

REPLY

Comes now the plaintiff in the above entitled action and replying to defendant's answer on file herein denies, affirms, and alleges as follows, to-wit:

I.

Replying to the allegations contained in Paragraph V upon page 2 of defendant's answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 2.

II.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 4 of defendant's alleged answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 4.

III.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 6 of defendant's alleged

answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 6. [66]

IV.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 8 of defendant's alleged answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 8.

V.

Further replying to defendant's alleged further answer and first separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph I thereof, this plaintiff admits the allegations contained in Paragraph I of said alleged further answer and first separate defense.

VI.

Further replying to defendant's alleged further answer and first separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph II thereof, this plaintiff admits that

plaintiff herein was an experienced truck driver; but denies each and every other allegation contained in said Paragraph II of said alleged further answer and first separate defense.

VII.

Further replying to defendant's alleged further answer and second separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph I thereof, this plaintiff admits the allegations contained in Paragraph I of said alleged further answer and second separate defense.

[67]

VIII.

Further replying to defendant's alleged further answer and second separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph II thereof, this plaintiff admits that plaintiff herein was an experienced truck driver; but denies each and every other allegation contained in said Paragraph II of said alleged further answer and second separate defense.

IX.

Further replying to defendant's answer on file herein, this plaintiff denies each and every allegation contained in said answer and said alleged fur-

ther and separate defenses filed herein by the defendant, which have not been heretofore admitted, qualified, or denied.

WHEREFORE, Plaintiff having fully replied to defendant's answer on file herein prays judgment in conformity with the allegations and prayer of his complaint on file herein.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff. [68]

State of Montana,
County of Silver Bow—ss.

T. J. Davis, being first duly sworn, on his oath deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that the plaintiff is absent from the County of Silver Bow, State of Montana, where affiant resides, and for that reason this verification is made by affiant; that affiant has read the above and foregoing Reply, and knows the contents thereof, and that the same is true to the best knowledge, information and belief of affiant.

T. J. DAVIS.

Subscribed and sworn to before me this 16th day of August, A. D. 1934.

[Notarial Seal] G. V. BREW
Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Aug. 18, 1934.

[Endorsed]: Filed Aug. 17, 1934. C. R. Garlow, Clerk. [69]

Thereafter, on September 27th, 1935, said cause came on regularly for trial and was tried on September 27th, 28th, and 30th, 1935, the record thereof being in the words and figures following, to-wit:

RECORD OF TRIAL OF SEPTEMBER 27, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

This cause came on regularly for trial this day, Mr. T. J. Davis and Mr. H. L. Maury appearing for the plaintiff and Mr. Wm. L. Murphy and Mr. J. C. Garlington appearing for the defendant.

Mr. W. P. Halloran of Anaconda, Montana, acted as court reporter.

Thereupon Mr. Murphy stated to the court that the defendant company has instituted certain bankruptcy proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, and for that reason desires at this time to amend its Answer herein by adding an additional paragraph setting out the fact of such bankruptcy, and there being no objection on the part of the plaintiff, court ordered that the record show that the defendant's said request is granted and that by agreement of counsel, expressed in open court, the new matter added to the Answer is deemed denied.

Thereupon the impanelling of a jury was proceeded with; and during the examination on voir dire of juror Fred Danzer, it appearing that said juror is not possessed of all his natural faculties and is unable to hear the testimony which will be introduced upon the trial of this and other cases, court ordered

that he be permanently excused from further service on the present jury panel pursuant to section 8889, Revised Codes of Montana of 1921.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the case, viz.

Harvey L. Keene, Fred Vincent, M. J. Irvin, George Priest, William A. Tatem, Wylie Ashworth, Forrest E. Norris, D. W. Shearer, W. J. Pendergast, A. R. Schopfer, Otto Van Horn, Sr., and F. B. Nickerson. [70]

Thereupon counsel for defendant moved the court for leave to amend the separate defense in the answer to show that such negligence contributed to the injury, if any, complained of, which motion was by the court denied as being now too late, and to which ruling of the court the defendant then and there excepted and exception duly noted.

Thereupon James Gilbert was sworn as a witness for the plaintiff, whereupon the defendant objected to the introduction of any evidence for the reason the complaint fails to state a cause of action, which objection was by the court overruled, and exception of defendant duly taken and noted.

Thereupon James Gilbert, having been sworn, testified as a witness for the plaintiff. Thereupon William Arthur, Clark Cutler, Edward Sears, Elwyn Dildine, C. L. Stubbs, Clifford Gilbert and John Truscott were sworn and examined as witnesses for the plaintiff and a piece of metal marked "Plain-

tiff's Exhibit No. 1", was offered and admitted in evidence, whereupon the plaintiff rested.

During the course of the trial, court ordered that the record show that the parties are granted an exception to all adverse rulings of the court without requesting the same.

Thereupon Edward Sears was recalled as a witness for the defendant, whereupon further trial of the cause was ordered continued until 10 A. M. tomorrow and the jury excused until that time.

Entered in open court September 27th, 1935.

C. R. GARLOW,
Clerk. [71]

RECORD OF TRIAL OF SEPTEMBER 28, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Counsel for the respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Edward Sears was recalled as a witness for the defendant, and E. A. McLeod, J. O. Jones, Carl Zur Muehlen, Albert Schurman, S. W. Hulben, James O'Neill and George Shue were sworn and examined as witnesses for the defendant, exhibits Nos. 2, 3, 4, 5, 6, 7 and 8, for the defendant, being offered and admitted in evidence, and exhibits 1-A 9 and 10, for the plaintiff, being offered and admitted in evidence. In connection with the testimony of the witness Albert Schurman the defendant made a certain written offer of proof,

to which the plaintiff objected, and the objection was by the court sustained and the offer denied.

And thereupon further trial of the cause was ordered continued until Monday, September 30th, 1935, at 10 A. M., and the jury excused until that time.

Entered in open court September 28th, 1935.

C. R. GARLOW,
Clerk. [72]

RECORD OF TRIAL OF SEPTEMBER 30, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Counsel for the respective parties, with the jury, present as before and trial of cause resumed.

Thereupon George Shue was recalled as a witness for the defendant, and J. M. Dennis, Walter Stephens and L. E. Neumen were sworn and examined as witnesses for the defendant, exhibit No. 11, for the defendant, being offered and admitted in evidence.

Thereupon, on the motion of counsel for the defendant, to which the plaintiff had no objection, court ordered that a copy of exhibit No. 11 be made by the court reporter and when certified by the clerk it be substituted in the files herein for original exhibit No. 11 and said Original exhibit be returned to counsel for the defendant.

Thereupon the defendant rested.

Thereupon James Gilbert was recalled as a witness in rebuttal, whereupon the plaintiff rested and the evidence closed.

And thereupon the defendant moved the court for a directed verdict for lack of proof and on other grounds stated, which motion was by the court denied.

Thereupon counsel for the plaintiff stated to the court that plaintiff now elects to stand on the counts of the complaint relating to intrastate commerce and consents to a dismissal of the two counts of the complaint relating to interstate commerce; whereupon court ordered that the record show that on motion of plaintiff's counsel counts one and two contained in the complaint in this action are dismissed and judgment of dismissal as to said counts ordered entered.

Thereupon the defendant renewed its motion for a directed verdict, which motion was by the court denied.

Thereupon, after the arguments of counsel, the court announced that it intended to give instructions requested by plaintiff Nos. 1, 2, 3, 4, and 6 and refuse to give plaintiff's requested instruction No. 5, to which no exception was taken. [73]

Thereupon court announced that it intended to give instructions requested by defendant Nos. 1, 2, 3, 4, 12, 17, 18 and 19, and refuse to give defendant's requested instructions Nos. 5, 6, 7, 8, 9, 10, 11, 13, 14, 15 and 16, to which refusal the defendant's counsel then and there excepted.

Thereupon, after the instructions of the court, the jury retired to consider of its verdict, in charge of the bailiffs who were sworn in open court.

By agreement of respective counsel, expressed in open court, court ordered that the clerk is authorized and directed to see that all exhibits introduced in evidence are delivered to the jury in the jury room.

Thereafter, at 8 P. M. this day, the jury returned into open court for further instructions, counsel for all parties being present.

Thereupon the court inquired of counsel whether or not they wished a stenographic report of the proceedings taken, whereupon Mr. Murphy, counsel for defendant, stated that the stenographer had gone, none was then provided and no stenographic report was taken.

And thereupon, after hearing the further instructions of the court, the jury again retired to consider of its verdict, the court remaining in session awaiting the verdict of the jury.

And thereafter, at the hour of 12:05 A. M., on October 1st, 1935, the jury returned into open court with its verdict, which verdict was duly received by the court, read and filed, and by the jury acknowledged to be its true verdict as follows, to-wit:

[Title of Court and Cause.]

"We, the jury, in the above entitled cause, find our verdict in favor of the plaintiff, Clifford Gilbert, and against the defendant, Chi-

cago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty-five Hundred (3500.00) Dollars. George Priest, Foreman of the jury."

Thereupon court ordered that judgment be entered in accordance with the verdict.

Entered in open court September 30th, 1935.

C. R. GARLOW,
Clerk. [74]

Thereafter on the 1st day of October, 1935, the verdict of the jury was duly filed and entered herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

We, the jury in the above entitled cause find our verdict in favor of the plaintiff Clifford Gilbert, and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty-five Hundred (3500.00) Dollars.

GEORGE PRIEST,
Foreman of the Jury.

Thereafter, on October 2, 1935, an order granting to the appellant an extension of time to and including the 30th day of October, 1935, within which to file its bill of exceptions, was duly made and entered, in the words and figures following, to-wit:

[75]

[Title of Court and Cause.]

ORDER GRANTING EXTENSION OF TIME.

Counsel for the defendant in the above entitled action having made application to this court for an extension of time within which to prepare, serve and file its Bill of Exceptions in the above entitled cause and it appearing to the court that respective counsel for the plaintiff and defendant have by written stipulation heretofore filed stipulated and agreed that the court may extend the time within which the defendant may prepare, serve and file its Bill of Exceptions to and including the 30th day of October, 1935.

NOW, THEREFORE, pursuant to rule 81 of the rules of practice of the above named court, the defendant is hereby granted an extension of time to and including the 30th day of October, 1935 within which to prepare, serve and file its Bill of Exceptions in the above entitled cause and the time for filing the same is hereby extended to and including said 30th day of October, 1935.

Dated this 2nd day of October, 1935.

JAMES H. BALDWIN,
District Judge.

[Endorsed]: Filed Oct. 2, 1935. C. R. Garlow, Clerk. [76]

Thereafter, on October 5, 1935, judgment was duly entered herein, being in the words and figures following, to-wit:

In the District Court of the United States, District of Montana, Helena Division

No. 1622

CLIFFORD GILBERT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

JUDGMENT.

This cause and action came regularly on for trial on the 27th, 28th, and 30th days of September, A. D. 1935, before the Court sitting with a jury, the plaintiff appearing in person and by his attorneys, H. L. Maury, Esq. and T. J. Davis, and the defendant appearing by its attorneys, William Murphy, Esq., and J. C. Garlington, Esq.

Witnesses on the part of the plaintiff and defendant were sworn and on completion of the plaintiff's proof and after plaintiff had rested, the defendant submitted evidence in its defense, and at the close of all the evidence and after both parties, to-wit: Clifford Gilbert and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, announced in open court that they and each

of them rested, the Court instructed the jury. Thereupon the cause and evidence was argued by the attorneys for the respective parties and at the close of said [77] arguments the jury retired to consider its verdict, and subsequently returned into open court with its verdict, which said verdict, after the title of the court and cause, was and is in the following words and figures, to-wit:

[After Title of Court and Cause.]

"We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we assess plaintiff's damages in the sum of $3500.00.

GEORGE PRIEST
Foreman of the Jury.

NOW, THEREFORE, by reason of the premises aforesaid, and by virtue of the law, IT IS ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree, that the plaintiff, Clifford Gilbert, have and recover of and from the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the sum of Three Thousand, Five Hundred Dollars ($3,500.00), together with plaintiff's costs necessarily expended in this action amounting to the sum of Sixty & 60/100 Dollars ($60.60).

Dated and entered this 5th day of October, A. D. 1935.

C. R. GARLOW,
Clerk. [78]

Thereafter, on October 24th, 1935, Defendant served on Plaintiff its proposed Bill of Exceptions and lodged the same in the Clerk's office on October 29th, 1935.

And thereafter, on January 3rd, 1936, said Bill of Exceptions was by the court signed, settled and allowed and filed herein, being in the words and figures following, to wit: [79]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS

BE IT REMEMBERED: That this cause came on regularly for trial before the Honorable James H. Baldwin, Judge of the District Court of the United States for the District of Montana, sitting with a jury, on the 27th day of September, 1935. H. L. Maury, Esq., and T. J. Davis, Esq., appeared as counsel for the plaintiff, and W. L. Murphy, Esq., and J. C. Garlington, Esq., appeared as counsel for the defendant.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the Court and exceptions taken, and the following evidence offered or introduced on the trial of this cause, to-wit: [80]

Mr. MURPHY: If the Court please, since the pleadings in this case were prepared the Milwaukee Railroad has been subjected to bankruptcy proceedings and is now in the Federal District Court of the Northern District of Illinois. I thought it good practice, and now ask leave of Court, to file an additional paragraph to the answer, setting out the fact of the bankruptcy. I have furnished coun-

sel with a copy of that paragraph. It is purely formal, and it in no manner changes the issues, so far as I am aware.

Mr. MAURY: I do not think, your Honor, that it much changes the issues This being an action for tort, the Court proceeds in an action at law. The only question is whether or not, if the plaintiff is successful, an execution can be levied. It goes only, as I take it, to the question of an execution, does it not, Mr. Murphy?

Mr. MURPHY: As I understand the orders heretofore made in this bankruptcy proceeding, the court has said that the Railroad Company may defend actions as though it were not in bankruptcy, but has made an order that its assets shall not be subject to levy, attachment, or other impounding; and I think that the order provides that the defense of an action shall not be at all to the prejudice of the defendant, its creditors, trustees, or other persons hereafter appointed.

Mr. MAURY: I think that is all right; and, so far as we are concerned, the amendment may be deemed denied by the reply.

The COURT: Let the record show that the request of the defendant for leave to amend its answer is granted, and that by agreement of counsel and by request in open court the new matter added to the answer is, for the purposes of this trial, deemed denied. File it by attaching it to the answer. [82]

PLAINTIFF'S CASE

OPENING STATEMENT

Mr. MAURY: If your Honor please, Counsel for the railway company, and Gentlemen of the Jury: This young man, Clifford Gilbert, brought this action against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, by and through his guardian ad litem. When he brought the action he was not of the age of twenty-one years, but he has now attained the age of twenty-one years, so that I think it fitting that the Court release the guardian ad litem and the action proceed just in the name of the young man. It is alleged in this complaint at law that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a common carrier, engaged in interstate commerce, and that the young man, Clifford Gilbert, was engaged in interstate commerce; that at the time he was injured, on the 30th day of October, 1933, plaintiff was a servant of the defendant, and employed by the defendant in interstate commerce. * * * We will show you, Gentlemen of the Jury, that this is an action under what is called "The Railroad Act of Congress for the Compensation in Money to Servants Injured by Defective Appliances Furnished by Railroads for Their Servants to Work With"; that the young man, Clifford Gilbert, was engaged in interstate commerce. He was engaged in taking debris from the main line of the Milwaukee Railroad. * * *

Mr. MURPHY: May it please the Court, in view of the statement made by counsel I desire to

call the Court's attention to the fact that in the answer of the defendant there is a special separate defense in which certain negligent acts on the part of the plaintiff are set out and designated as primary negligence. I ask leave of court to incorporate the same paragraph as a fur- [83] ther and separate defense, with the change only that such negligence contributed to the injury, if any, concerning which the plaintiff complains. I make that request, your Honor, because apparently, in view of the statement made by counsel, the theory of counsel is that this plaintiff, as well as the defendant, were, at the time of the accident, engaged in interstate commerce. There would be no change in the pleadings or the wording of the separate defense.

The COURT: If there is no change there is no purpose for the amendment, and the request is denied.

Mr. MURPHY: I said there is no change except in pleading primary negligence we would desire to allege that those acts of negligence already pleaded are of such a nature as contributed to the injury, if any, concerning which the plaintiff complains.

The COURT: In my view the statement merely follows the allegations of the pleadings, of which you had notice. You have pleaded assumption of risk and contributory neglect as affirmative defenses. The application comes too late and is denied.

Mr. MURPHY: We note our exception to the ruling of the Court.

The COURT: May I ask whether all parties agree that the company and the employee were engaged in interstate commerce, or is there an issue on that?

Mr. MAURY: We agree. Our testimony, I believe, will show that they were both engaged in interstate commerce.

Mr. MURPHY: Our investigation of the facts and our understanding of the law are such that we cannot agree that this plaintiff was engaged in interstate commerce.

Mr. MAURY: Because of the delicacy of that question we have pleaded both ways.

The COURT: I notice you have two strings to the bow. We [84] will proceed with the testimony.

JAMES GILBERT,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Maury:

Q. Your name is James Gilbert?

Mr. MURPHY: If the Court please, I desire at this time, as a matter of precaution, to interpose an objection to the introduction of any evidence in this case whatsoever upon the ground that the complaint does not state a cause of action; and particularly in view of the opening statement of counsel to the jury of the allegations of the complaint

(Testimony of James Gilbert.)

in reference to the manner and happening of this accident, in that the manner and happening thereof would be contrary to physical laws, and could not be anticipated, foreseen, or guarded against.

The COURT: The objection is overruled.

Mr. MURPHY: Note our exception.

A. Yes, sir.

The WITNESS: I have lived in Deer Lodge, Montana, for the past thirty-six years. I am Fire Chief and Street Commissioner of Deer Lodge at the present time. The plaintiff, who is now twenty-one years of age, is my son. I am acquainted with the Mack truck which was used by the Milwaukee Railroad in October, 1933, in cleaning debris from the railroad right-of-way.

Q. Do you know where that truck came from?

A. Yes, sir.

Q. How do you know?

A. Because I came over and got it from the State Highway Com- [85] mission, over here at Helena.

Q. Who brought the truck from the Highway Commission to the city of Deer Lodge?

A. I did.

Mr. MURPHY: May it please the Court, I will object to that question and to questions of a similar character calculated to extract information as to where the truck came from and as to its age and condition generally, except as to the condition concerning which specific complaint is made, and which,

(Testimony of James Gilbert.)

under the complaint and under the statement of counsel, is the sole alleged ground and cause of the injury.

The COURT: It is a circumstance that I think can properly be considered. The objection is overruled.

Mr. MURPHY: Note our exception.

The WITNESS: When I came to Helena to get the truck, which was twelve years ago, it looked like an old truck to me. The first three or four years after we got the truck to Deer Lodge we used it quite a bit, but after that we did not. It was a Mack truck. I occasionally drove it personally.

Q. Confining yourself to times before October, 1933, describe to the jury anything out of the ordinary that that truck did or did not do.

A. Well, it never would hit——

Mr. MURPHY: May it please the Court—and I think this objection will cover the whole situation—

The COURT: Of course, Mr. Maury, I expect you to confine yourself to the specific defects alleged in the pleadings.

Mr. MAURY: We are going to keep within those.

[86]

The COURT: You allege that the truck was old and worn, dangerous and unsafe for use by the plaintiff in this case. Now, in my view of pleading, you have confined yourself by your allegations in

(Testimony of James Gilbert.)

this complaint to the specific statements set out in Paragraphs 3, 4, and 5 of your pleading.

Q. Mr. Gilbert, you may describe what happened in connection with this truck prior to October, 1933; that is, how it acted with reference to the fan belt, the shaft on which the fan revolved, and the fan itself.

Mr. MURPHY: That is objected to as too remote, not being definite as to time. It may have been long before this accident. It is further objected to for the reason that the specific allegation is with reference to the explosion of the fan; and the various allegations in the complaint with reference to the pump and the oil and other defects and outworn conditions apparently have nothing to do with the accident or its cause.

The COURT: The objection is overruled.

Mr. MURPHY: Note our exception.

A. Well, the fan belt was breaking quite often. The fan belt runs on a fly-wheel. The bearing in the fly-wheel was loose and it wobbled. It had a tendency to jump and break the belt. The belt set in a little groove, and the fan was a little loose, and if it would give a quarter of an inch it would bind that belt in that groove and break.

The WITNESS: I saw the belt break, I guess, ten or twelve times. It kept on breaking all the time, and we kept repairing it. I made a new one and that also broke. I do not know exactly the time at which this truck was delivered to the Milwaukee

(Testimony of James Gilbert.)

Rail- [87] road, but I know we towed it over there. We could not start it. The clutch was froze, and we could not get the car in gear or out of gear, and we had to pull it over to the Milwaukee. I delivered the truck to the Milwaukee at the request of the Mayor of Deer Lodge. I cannot remember to whom I delivered the truck. I took it over to the Milwaukee and left it there. I believe Mr. Sears, the Master Mechanic, was there at the time. The body of this truck came from an old truck that was smashed by the Northern Pacific about fourteen years ago. At the time we took the truck to the Milwaukee it was impossible to start it without either towing it or allowing it to run down a hillside. I had seen people trying to start it previous to that, and we had tried for hours at a time to start it. Practically every time we used it it was necessary to drag it through the streets of Deer Lodge in order to start it. Sometimes it would be necessary to drag it only a hundred feet, sometimes two blocks, and sometimes three or four. It had never been equipped with a self-starter. While it was supposed to be started by cranking, I do not believe it was possible to start it by cranking it unless it was awfully warm outside. Everytime we took the truck out and ran it more than four or five blocks it boiled, and we would have to carry water with us. The day my son, the plaintiff, was injured Mr. Sears came to the house and told me my son had been hurt. He said that while he had not been hurt bad he had had his

(Testimony of James Gilbert.)

hand cut. I went to the doctor's office, and there I saw that my son's third finger was hanging down and the little finger was all cut. The third finger was removed, and while he still has the little finger, it does not amount to much.

Mr. MURPHY: Merely for the purpose of preserving the record as to the condition of the truck and its age [88] and where it came from, we move to strike from the testimony of the witness that evidence of the nature indicated as being immaterial and non-probative in this case and outside the material issues.

The COURT: The motion is denied.

Mr. MURPHY: Note our exception.

Cross-Examination by Mr. Garlington.

The WITNESS: We have repaired this truck from time to time. As Street Commissioner I take care of all the road machinery of the city of Deer Lodge. I am a mechanic by experience but not by trade. During the last three or four years I had not been familiar with the condition of the truck, as we had not repaired it during that time. I knew its condition prior to that time. I drove the truck occasionally, and several others, including the plaintiff, also drove it. I would not say for sure, but I think the plaintiff first began to drive the truck six or seven years previous. He did not help me around the shop, but he occasionally worked for me on the streets and drove the truck. He may have gained

(Testimony of James Gilbert.)

some of his mechanical skill while working for me, but he also worked for Floyd Gerrish around the garage. I would not be sure, but I believe the last time the truck was used prior to its delivery to the Milwaukee was the previous spring, when the county had it in use for two or three months and during which time it was being driven by the plaintiff. The previous winter it was used in hauling crushed rock for the city, but the plaintiff was not driving it at that time. It was being driven by William Arthur. I do not remember whether, during that time, the plaintiff was around the shop with me. I cannot recall of any certain previous occasions when the plaintiff drove the truck. It was driven by several different persons and I did not [89] take particular notice to who was driving it. However, I do recall that on previous occasions over a period of five or six or seven years Clifford Gilbert, the plaintiff, drove the truck. I cannot say whether during that time the plaintiff assisted me in the repairing of the truck. We used to do all the work we could in the repairing of the truck, and we also took it to other garages. The truck had been defective ever since we got it. I put water in it a thousand times before I got it from Helena to Deer Lodge. The truck had floor boards in it, and they were in it at the time I first got the truck. The truck had to be towed to the Milwaukee shops. I do not remember who sat in the truck and guided it. I pulled it over. I do not think Clifford was with me on that occasion. I think

(Testimony of James Gilbert.)

he was at home. I left the truck in the yards in front of the shops that burned, and then I left. In the cab of the truck there is a large, circular opening, covered by a very wide mesh guard, through which the fan can draw air into the radiator, and the fan is, to all intents and purposes, completely visible. One end of the axle or bearing on which the fan rotates projects out into a support that is in the cab, and on the other end is another support for the bearing. The support on the other end may have been an inch or so to one side or the other, but it is substantially opposite the pet-cock on the fourth cylinder. I believe that pet-cock and the protruding end of the fan were about five or six inches from each other. The housing in which the fan operated, on the side toward the motor, was entirely open, so that anyone standing at the side of the motor and watching it operate could see the fan as it rotated. There were four cross members in front.

Redirect Examination by Mr. Maury:

Q. Can you tell us whether there was any peculiar noise that [90] the fan or the machinery rotating the fan made?

Mr. MURPHY: That is objected to, your Honor, for the same reasons heretofore stated in other objections, as being outside the issues, immaterial, and not probative in this case.

(Testimony of James Gilbert.)

The COURT: In my opinion, Mr. Murphy, it has a tendency to show knowledge, and for that reason I think it is material.

Mr. GARLINGTON: We should like to make the further objection that it is not proper redirect examination.

Mr. MAURY: We ask leave to ask it as direct.

The COURT: Leave is granted and the objection is overruled.

Mr. MURPHY: We wish to note an exception.

A. Yes, sir; there was a kind of a grind—kind of a knock.

The WITNESS: I cannot say how long this knock existed, but it was for a long time before the accident. I recall noticing it when we were hauling crushed rock for the city in 1932. I saw the truck after Clifford was injured, and at that time it had not been repaired in any way since it had been towed over to the Milwaukee shops. I cannot tell you of what material the truck fan was made. Exhibit 1, for identification, is a piece of the fan.

Recross Examination by Mr. Garlington:

The WITNESS: You could hear this noise of which I spoke any time that you started the motor, except when the fan belt was broke, and then you could not hear it. All the time the truck was in operation and the fan belt was on the noise was present and could be heard by the driver or by any

(Testimony of James Gilbert.)

person about the truck. I guess it was about two hours and a half, or something [91] like that, after the accident that I saw the truck.

Re-Redirect Examination by Mr. Maury:

The WITNESS: When I saw the truck after the accident it was at the Milwaukee shops.

WILLIAM ARTHUR,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is William Arthur. I have been a resident of Deer Lodge, Montana, since January 20, 1920. I am a switchman, but I have driven a truck. During the winter of 1932 for part time during two months I drove the Mack truck owned by the city of Deer Lodge. I was employed by the city of Deer Lodge as a truck driver at that time, and I was engaged in hauling crushed rock onto the streets. The Mack truck was an old dump truck. I operated the truck myself. At that time we had trouble starting it in the morning. It had no self-starter on it, and we would usually have to tow it a block before it would start. I do not know what year's model the truck was. The truck would heat when I drove it, and when I would drive it about eight or ten blocks I would have to put water in the radiator. With a load the truck would heat up in a distance of about three blocks. When

(Testimony of William Arthur.)

the motor was cold the truck would jerk, but when the motor warmed up it seemed to run fairly smooth. When it would jerk I would do nothing about it, and I did not attempt to regulate the carburetion or the gasoline flow. It has been so long ago that I could not give a very good description of the fan on this truck. I believe you could see a part of the fan from the driver's seat, and, if you raised the hood, you could [92] see the fan from the front end of the truck. It seemed to be more or less closed in, being sort of bellows-shaped and in an enclosure, with, I believe, four strips across the enclosure with spaces between the strips so that the fan was plainly visible. I would judge the fan was six or eight inches in back of the motor. I think the fan belt broke twice while I was driving the truck. My theory of the cause of its breaking is that the belt was too old, as it looked as though it had been on the fan ever since the truck was built. I think Mr. Gilbert told me this was one of the trucks used during the war.

Q. In the *draggin* of this truck for at least a block, as you have stated, Mr. Arthur, what have you to say as to whether or not it was necessary to prime the cylinders in order to start the motor, particularly if it had stood idle for some time?

Mr. MURPHY: That is objected to, your Honor, for the reason that the evidence shows the engine was running at the time of this accident, and there was no occasion to prime it. It is imma-

(Testimony of William Arthur.)

terial whether pleaded in the complaint or not. It is a matter that has no probative value here.

Mr. DAVIS: We offer it simply for the purpose of showing the condition that could be found even by a casual inspection. If this car was difficult to start and had to be dragged, it was notice to anyone using the truck; and we have pleaded it was an old, decrepit truck.

The COURT: Is not the real question involved here with reference to the fan and bearing and connections?

Mr. DAVIS: That is true, but we have pleaded also that the engine was in bad condition, that it heated up, that the pistons did not hold the oil, and that the en- [93] gine generally was in such bad condition as to cause it to buck, and that this condition resulted from the fan failing to work.

The COURT: If you are prepared to show those things, it is within the issues, but you must connect this up. These matters are allowed to go in merely on the question of the giving of notice to the company or anyone interested, and if you wish to confine it to that by instruction, the jury will be so instructed. The objection is overruled.

Mr. MURPHY: Note our exception.

A. I don't think that I ever tried to start the truck after it stood idle for a long time.

The WITNESS: We would leave the truck at night, and the following morning it was at times necessary to drag it in order to start it. I do not

(Testimony of William Arthur.)

remember of ever having had to tow it more than a block to get it started during the time I drove it. We never primed it during the time I drove it because the primers were plugged up with dirt. About the only time I remember that the truck would jerk is when there was a heavy load on it and you would get into a tight pull, or something like that.

Q. What have you to say as to the manner in which the body of the truck worked?

Mr. MURPHY: That is objected to, your Honor, for the reason that the body is not mentioned in the complaint at all. I shall make no further objections along this line. I think the Court has my position, that these matters are not probative and are not connected with and have nothing to do with the manner and mode of this action. [94]

Mr. DAVIS: May it please the Court, it is pleaded that an oil compression was used in the dumping process of this truck, it being an automatic dump truck, and that the oil used was not of the right type, being not heavy enough; and that also the cylinders containing the oil permitted the oil to exude.

The COURT: Were they connected with the fan?

Mr. DAVIS: In this way, your Honor: we see it as proving that this was an old, worn truck, and that the condition of the truck was such that its condition was called to the attention of any person using it in his work; and it shows the need of at least a cursory inspection before using it.

(Testimony of William Arthur.)

The COURT: I think you have proceeded far enough along that line.

(It being noon, a recess was taken until two o'clock p. m.)

Cross-Examination by Mr. Garlington

The WITNESS: The radiator and fan of this truck are to the rear of the motor and between the motor and the cab of the truck, the radiator and the fan forming, more or less, the dashboard of the truck. There is no fan or similar appliance at the head end of the truck. The hood is one piece that raises up from the front, hinging on a coil near the dashboard of the truck. When I was operating this truck it was winter time, and in the cold weather it was necessary to tow the truck about a block to get it started. Clifford Gilbert was not with me during any of the winter of 1932 while I was driving this truck. The radiator did not leak much. In fact, we had anti-freeze in it part of the winter. I had no trouble with the truck other than as I have mentioned. [95]

Redirect Examination by Mr. Davis

The WITNESS: The fact is that the radiator did not leak to any appreciable extent while I was driving the truck. However, the engine heated. The hood was one solid piece that lifted up toward the driver's seat. Mr. Gilbert, the plaintiff, did not ride with me while I was driving the truck. At

(Testimony of William Arthur.)
the present time I am employed as a switchman by the Milwaukee Railroad, the defendant in this case.

CLARK CUTLER,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Maury

The WITNESS: My name is Clark Cutler. I have resided at Deer Lodge, Montana, for twenty years. I am acquainted a little with the Mack truck owned by the city of Deer Lodge and that was turned over to the Milwaukee Railroad. I do not remember just when it was that I started to work for the city and became acquainted with that truck, but I think it was in 1933. I do not remember when Clifford Gilbert was hurt or when it was the truck was being used for hauling debris from the Milwaukee yards. We first used the truck for hauling crushed gravel, which was, I think, in the spring of 1933. It was probably a month or two that the truck was used on that occasion. I was just working there, and I was not using the truck, although I rode in it. I noticed that the water in the radiator would heat and boil over and that they would have an awful time starting it. It had to be towed sometimes three blocks and sometimes less to get it started. I do not remember of ever seeing it start without being towed. It seemed to run pretty good

(Testimony of Clark Cutler.)

when it got going I remember of only [96] one time when they had trouble with the fan belt. It broke just as the truck was being driven away from the crusher. I do not know and could not figure out why it broke. I do not know if the fan belt had been broken previously or not, as I was quite a ways from the truck when the belt broke and I did not go over to the truck to see the belt. I knew the belt broke because Clifford Gilbert, who was driving the truck, had the belt in his hand; but I was on the other end of the crusher, and I could not see from there if the belt had been broken before. The truck would heat up whether it was climbing a hill or being run on the level, and the radiator had to be filled with water pretty often. They had to carry water with them to fill it. I do not know just how far the truck would run between fillings, but probably four or five blocks sometimes. I do not know over how long a time I observed that condition. The truck is now over at the Milwaukee shops. It has not been used the last year or so that I know of. I am not very familiar with the Milwaukee yards, so I could not state in just which building the truck now is. I do not know where the priming cocks on that truck are located, as I have never looked at the motor much.

Cross-Examination by Mr. Garlington

The WITNESS: In the spring of 1933 I was employed on the rock crusher by the city of Deer Lodge. Clifford Gilbert drove the truck during the

(Testimony of Clark Cutler.)

full period that I worked there. The crusher had a screen over the conveyor belt, and my work was to pick the big rocks that would not go through the screen off the conveyor belt. My work during all the time was at the crusher. During the time I worked on the crusher I noticed that the truck would heat up. My only occasion to ride on this truck was in going to and from my work. Inasmuch as I was not close enough to the [97] truck to see, I could not tell you if when the fan belt would break the fan itself would cease to revolve.

EDWARD SEARS,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis

The WITNESS: My name is Edward Sears, and I have resided in Deer Lodge, Montana, for nearly twenty years, during all of which time I have been Master Mechanic for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I recall a fire which occurred, I believe, on October 21, 1933. The fire started from some unknown origin and destroyed our main machine shop and all equipment. I had partial charge of clearing up the debris. Two or three days after the fire our superintendent came to Deer Lodge and wanted to know if some trucks could be procured to haul away debris. We looked

(Testimony of Edward Sears.)

around but were not successful in getting any, so finally I called up Mayor Marquette, of Deer Lodge, and asked him if he knew where we could get some trucks. He told me the city had a truck that we were welcome to use. We accepted his offer, and to the best of my memory the truck was delivered to the Milwaukee by Mr. Gilbert, the Fire Chief of the city of Deer Lodge. The truck was then turned over to Mr. McLeod, foreman of the B. & B. Department, who was to furnish a driver for the truck and place the truck in operation. The truck was then used for hauling away burnt timbers, dirt, bricks and whatever other accumulations there happened to be there. No machinery was hauled at that time, and at no time was any machinery hauled from the site of the fire by truck. The machinery was all moved on railroad cars, some, I think, going to Tacoma and some to Milwaukee. [98] It was the main machine shop that was destroyed by the fire. This building was not rebuilt, but a building sufficiently large to accommodate the machinery which we installed was added to the roundhouse, which is, I would say, about four or five hundred feet from where the machine shop originally stood. It was not possible to ship this machinery to Tacoma or Milwaukee, or wherever it might be shipped, without first removing the debris; or, in other words, in order to ship the machinery it was first necessary that the fire debris be cleared away. The first work the truck was used on was in clearing up the northwest cor-

(Testimony of Edward Sears.)

ner of the building to allow for the construction of a foundation to make repairs to the roundhouse. That is where Mr. McLeod's gang was working. This roundhouse is used for the maintenance and inspection of engines of the Milwaukee Railroad, which engines are used in interstate commerce. The Milwaukee Railroad originates in Chicago and has its terminus at Tacoma.

Q. The Milwaukee Railroad runs through the states of Minnesota, Dakota, Montana——

The COURT: I take it there is no contest about its being an interstate carrier?

Mr. MURPHY: No.

The COURT: That may be admitted?

Mr. MURPHY: Yes.

The WITNESS: When we started to clear away the debris it was our intention to ship the machinery to Milwaukee and Tacoma. Clifford Gilbert was engaged by us in the work of cleaning up. I saw him the day he was injured, and I noticed that his ring finger of the right hand was very badly mangled and that his little finger was lacerated and his hand covered with blood. Mr. Jones, my mechanical foreman, took him to the physician before I [99] was informed of the accident, and as soon as I learned of his being injured I went to the physician's office to see just what had happened. I then looked at the truck and noticed that several vanes of the fan were broken. While I could not testify that Ex-

(Testimony of Edward Sears.)

hibit 1 for identification is a part of that fan, it is very similar in material to the fan. The fan is made of cast aluminum. When I saw Clifford Gilbert at the doctor's office he was in considerable pain and I did not inquire of him the cause of the accident. I did not make an inspection of the truck at the time the Milwaukee Railroad secured it. Following the accident I inspected the truck and found several fan blades broken, and some of the broken blades had jammed the fan so that it could not rotate, and one of the four arms placed in front of the fan for protection was cracked. I would assume that one or more of the fan blades had broken and blocked the fan, causing the breaking of other blades. From its appearance I would think that Exhibit 1 for identification is a part of the fan.

Q. Then you didn't inspect the motor of the truck at any time prior to the accident?

A. Had no reason to.

The COURT: That answer will be stricken out as not responsive.

Q. You didn't, did you, Mr. Sears?

A. I did not.

The WITNESS: I did not direct anyone else to inspect the motor of the truck prior to the accident. When the truck was received I turned it over to Mr. McLeod, foreman of the B. & B. Department, and he furnished a driver. This was an old army truck. [100]

ELWIN DILDINE,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is Elwin Dildine. I have lived in Deer Lodge, Montana, for the past eighteen years. I am twenty-four years of age. I know Clifford Gilbert a little. Until I was laid off I was employed as an electrician's helper by the Milwaukee Railroad. Since being laid off I have been a service station attendant. I was riding on the truck with Clifford Gilbert the day he was injured. My job was to see that the debris did not fall off the truck. I do not remember the exact date of Mr. Gilbert's injury or even the month. It was in 1933. At the time Mr. Gilbert was injured the car had stopped but the engine was running. We had just taken a load to the dump and we were returning to the place where the machine shop of the Milwaukee Railroad had been before the fire, which is the same building to which Mr. Sears referred in his testimony. Where we were dumping the debris was a quarter or a half mile from the point where we were loading it onto the truck. On our return trip the engine was missing, and I believe Clifford wanted to find out what was causing it to miss and adjust it. By missing I mean that the combustion in some of the cylinders was not perfect. When the engine missed it would

(Testimony of Elwin Dildine.)

lose power and the truck would jerk. Mr. Gilbert did not tell me what he intended to do. He first did a little investigating. He was on the other side of the truck from me, but I presume he was opening those pet-cocks or seeing they were tight. He had to lift the hood to get at the motor. There are four pet-cocks on the motor, one on each cylinder. They are located somewhere close to the spark-plug, but I could not tell you their exact location. Towards the end [101] of the motor nearest the driver's seat there is a pet-cock. The fan was in the center of the radiator and could be seen from the driver's seat, as well as from the front end of the truck when the hood was raised. On the driver's side of the radiator there was a housing over the fan, but I did not notice whether there was a housing on the motor side. If I remember correctly, the housing consisted of a wire grill. I did not see the four strips that covered the fan on the motor side. It was the jerking and lack of power that first called our attention to the missing of the motor. The motor would overheat, but I was not on the truck enough to tell you how often it was necessary to fill the radiator. That was the first time I was ever on the truck. The first I knew that Mr. Gilbert was injured was when he hollered and started to run and asked me to turn off the motor. I turned off the motor at that time. I afterwards looked at the fan and noticed a number of broken blades and a number of pieces of metal down

(Testimony of Elwin Dildine.)

in the fan grill and down in the radiator. The pieces of metal I saw were similar to and of about the same thickness as Exhibit 1 for identification, which exhibit looks like a part of the fan. When Mr. Gilbert was injured he did not say anything other than what I have told you except to exclaim, in a sort of a prayerful way, "Jesus Christ." He had not had time yet to feel any pain, as when an accident like that occurs your hand gets numb. I did not see any blood. All I could see were two fingers and the glove torn away. I did not see him when he was taken away to the doctor's office. This accident occurred on the premises of the Milwaukee Railroad between ten and eleven o'clock in the morning. We commenced work that day at eight o'clock, and I think we had made three trips previous to this one. [102]

Cross-Examination by Mr. Garlington:

The WITNESS: When I looked at the fan after the accident I saw several pieces of the fan down in the bottom of the fan housing. When the accident occurred we had delivered the load of debris to the dump and we were returning to get another load when Clifford stopped the truck. The material we were hauling was just thrown on the dump as waste material.

Redirect Examination by Mr. Davis:

The WITNESS: The truck was an old truck.

C. L. STUBBS,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is C. L. Stubbs. I reside at 1601 Livingston Street. I have lived in Helena all my life, or for about forty years. For the past twenty odd years I have been employed as a machinist. I was first employed by the Northern Pacific for about eleven years. Later I worked for the city for about a year and for the Great Northern for six or eight months. I am now employed by Burgan & Walker, agents for Buick and Pontiac automobiles, as shop foreman in charge of repairs. I supervise the repairs of automobiles to the extent of an average of four or five hundred a month. At the present time I have three mechanics under me. I am familiar with automobile fans, and in my work as foreman I have had occasion to see the results of fans that have broken and disintegrated. I had occasion to see one last week.

Q. Supposing you had a car extremely old, shown to have a wobble in the fan, with worn bearings, that gave forth a loud hum as the fan revolved, and it was shown that the flanges or pieces [103] of that fan had broken off and had flown through the air while the shaft was revolving, and basing your answer on your experience in having cared for all the cars of which you have testified, what, in your opinion, would have caused that fan to break or come apart?

(Testimony of C. L. Stubbs.)

Mr. MURPHY: That is objected to, your Honor, for the reason that it is a supposititious question which includes elements which have not been developed in testimony here. I refer particularly to that element in which counsel describes pieces of the fan as being thrown through the air. For that reason it is not pertinent to anything so far developed in this case.

Mr. MAURY: The proof is that two or three pieces were found in the housing. Certainly they would be thrown a short distance in the air. And we have the proof that a piece was thrown out through one of these holes a distance of six or eight inches, and that it struck and took off a finger of this plaintiff and injured the little finger.

The COURT: I do not recall this proof.

Mr. MAURY: I do not think it is testified that the piece struck his finger. It might be a fair inference. I will assure the Court that we will connect this up.

The COURT: With the assurance that you will prove that fact the objection is overruled.

Mr. MURPHY: Note our exception.

The COURT: Let the record show that whenever an objection is made and overruled the party making it is granted an exception on the record without asking that the exception be noted. [104]

(REPORTER'S NOTE: Because of the immediately foregoing ruling of the Court all exceptions hereinafter noted by counsel will be purposely omitted from this transcript.)

(Testimony of C. L. Stubbs.)

Mr. MURPHY: That is further objected to for the reason that it is incapable of an answer, not being sufficiently definite in indicating to the witness what may have caused the fan to break, and as to whether or not it was an obstruction, centrifugal force, an explosion, as alleged, or otherwise.

The COURT: That is just what they are trying to find out. That is the purpose of the question. The objection is overruled.

A. As long as there was no obstruction and your bearing was badly worn, I would say it was an out-of-balance condition. Centrifugal force would tear that fan apart.

The WITNESS: If there was no great strain on the fan belt, that is, from play or from a frozen bearing or anything like that, and the belt was jamming the fan all the time. I would say it was caused from out-of-line.

Q. Supposing it were shown that the bearing was so worn that the fan had a play of approximately a quarter of an inch?

Mr. MURPHY: That is objected to as not being produced in the evidence.

The COURT: The objection is overruled.

A. Do I understand that is on the shaft itself or at the top of the fan blade?

Q. As it revolves on the shaft there was a play up to approximately a quarter of an inch. What would cause that, where, in the fan itself, the movement or the wobble would be to the extent [105] of approximately a quarter of an inch?

(Testimony of C. L. Stubbs.)

A. Wear in the bearings.

The WITNESS: The tendency of worn bearings would be to throw the fan off center and cause it to wobble.

Q. Now, Mr. Stubbs, basing your answer again upon your experience, what have you to say as to the safety of using a truck with a fan in the condition which has been described with a wobble to the extent of approximately a quarter of an inch, and with the fan belt breaking repeatedly, and with this hum and knock in the bearings on the drive shaft as the shaft revolved?

Mr. MURPHY: That is objected to, your Honor, for the reason that it is the direct question involved and is a question for the jury.

The COURT: The objection is sustained. That is the very question, gentlemen, that the jury is called upon to determine, as to whether that was a reasonably safe appliance.

The WITNESS: If a car were driven in the condition described one could look for trouble in cooling, and there might be a breakage of the fan itself.

Cross-Examination by Mr. Garlington:

The WITNESS: I have not seen the fan involved in this case and I know nothing of its condition, my testimony being based upon the statements and suppositions of counsel. The fan which I testified broke last week was a motor-car fan and was made of steel. It is not ordinarily the fact that a

(Testimony of C. L. Stubbs.)

fan blade is broken by reason of an obstruction. A fan would be more likely to break when revolving at a high speed than at a low speed. If the fan was revolving at 500 revolutions a minute the centrifugal force would be a given amount, and if revolving at 1,000 revolutions a [106] minute the centrifugal force would be greater, but I could not say what the ratio is between the speed of the fan and the centrifugal force exerted at that speed.

Redirect Examination by Mr. Davis:

The WITNESS: With a fan running 500 revolutions a minute or a thousand revolutions a minute and with the bearings smooth and in good condition the resistance would be at a minimum. With the bearings worn and the fan wobbling to the extent of approximately a quarter of an inch, the resistance would be greater. If a fan runs out of alignment and knocks somewhat it would indicate to me that the bearings are loose.

Q. What happened in the case of the steel fan to which Mr. Garlington directed your attention?

Mr. MURPHY: That is objected to——

The COURT: It was brought out on cross-examination by your co-counsel.

Mr. MURPHY: Well, I object to it as being entirely immaterial and having no probative force.

The COURT: That is probably true, but where it is brought out on cross-examination they have a right to inquire into the matter.

(Testimony of C. L. Stubbs.)

A. The fan blade broke off and drove it right through the hood.

The WITNESS: I had not seen that fan before the accident. As to the distance this steel fan was thrown when it broke, I can go only by what the owner of the car told me. He said it was thrown at least fifty feet in the air after passing through the radiator shell. [107]

CLIFFORD GILBERT,

the plaintiff, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Maury:

The WITNESS: I am twenty-two years of age. On October 30, 1933, I was working at Deer Lodge, Montana, for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, having been employed by Mr. Sears, the Master Mechanic for that company, and the same gentleman who testified in this case. I was employed to drive a truck. I forget whether I was working three days or three and a half days when I was injured. When I was injured I was engaged in trucking charred timbers, dirt, and a few brick to the dump. There was machinery mixed up in this debris, and we were hauling the debris away from the machinery. That morning about eleven o'clock the truck cylinders started to

(Testimony of Clifford Gilbert.)

misfire and the truck began to jerk and heat up and it did not pull as well, so I got out to see what was the matter. I raised the hood and adjusted the carbureter, and in looking over the motor I found the rear priming cup open. The priming cup is used to pour raw gasoline in as an aid to starting the motor. While I was adjusting this the fan, which was six or eight inches from my fingers, broke, cutting off my ring finger. The fan was revolving when it broke and a piece or pieces of the fan struck my fingers. It was not possible to make an adjustment such as I desired to make without the motor running. Exhibit 1 for identification is a piece of the fan, but whether it is a piece that struck me I do not know. I got this piece, Exhibit 1, from the bottom of the splash-pan of the truck about a month anyway, I would say, after the accident. Whether the truck had been used in the meantime I do not know. The truck is now at the Milwau- [108] kee Railroad shops.

Q. How long had you known that truck before the day you were hurt by the breaking of the fan?

Mr. MURPHY: That is objected to, your Honor, for the same reasons heretofore stated, that it is too remote and is not probative in this case. I renew this objection because this is a new witness and the plaintiff.

The COURT: The objection is overruled.

A. Well, about five or six years or more.

(Testimony of Clifford Gilbert.)

The WITNESS: The last time previous to the time the Milwaukee Railroad took the truck over that I had driven it was about six months, at which time I drove the truck for about ten days for Powell County. Someone had driven it for the Milwaukee Railroad before I started to drive it. My father, Mr. Gilbert, took the truck over to the Milwaukee Railroad at the time it was delivered to the railroad company. I had no expectation or suspicion that the fan might fly apart, and I had had no experience of any kind with a fan flying apart. I would say that at the time the fan broke it was traveling at a medium speed. Previous to the time of the accident I had had trouble with the fan belt breaking, and on the occasion of my using the truck approximately six months previous to the accident I had fixed the fan belt five or six times. When the fan was revolving it made a sort of a thumping sound. I never paid much attention to whether the fan was in alignment or not, but I know it wobbled, as I could see that and had seen it at various times when I had the hood up. When I say it wobbled I mean the bearings were worn and it was loose on the shaft. When I got hurt I looked for Mr. Sears, but I ran onto Mr. Jones, I believe, and he took me to the storeroom and bandaged my hand. On my ring finger the flesh was torn away and [109] the bone was broke off and the finger was hanging by the cord; and the flesh on the little finger was torn away for approximately two-thirds

(Testimony of Clifford Gilbert.)

of the length of the finger, or, I might say, scraped away from the bone. The little finger is permanently crooked and it is not possible for me to use the last joint of that finger. It has stayed in its present position since the date of the accident. I have very little strength in my little finger and it is of no use to me. Where the ring finger was removed is very tender to jarring or being struck. My right hand is in such a condition that when using a wrench I have a constant fear of its slipping and my hand being skinned, and when using a hammer the hammer rocks in my hand, and just as I might strike at something the hammer might rock back and forth and I would miss the object at which I was striking. I am right-handed, and there is nothing I do with my left hand in preference to my right. In using a two-handed tool I always place the right hand in front of the left. I find it embarrassing when I shake hands with strangers. Before this accident I was given to playing baseball and to bowling. This injury to my hand has affected the control of my ball in bowling, and in playing baseball I would be afraid to reach out to catch the ball.

Q. Do you know whether there are certain concerns or employers of labor that will not permit a man injured as you are to go into service?

Mr. MURPHY: That is objected to, your Honor, first because apparently the witness does not have any special knowledge in regard to that, and,

(Testimony of Clifford Gilbert.)

secondly, it is too remote. The whole question here is to what extent his capacity has been impaired.

The COURT: The objection is overruled. The inquiry [110] should be confined to his own personal experience in seeking employment.

A. Well, I couldn't say for sure.

The WITNESS: I sought employment at the Gerrish Motors in Deer Lodge since this accident, and my injury prevented my securing employment, the reason assigned being that it slowed up my work. I had previously been employed by the Gerrish Motors. I would not be permitted to serve the United States in war if I sought to enlist in either the Army or the Navy. Before my injury I was following the occupation of an automobile mechanic, and these injuries I received have interfered with my work as a mechanic. I received excellent medical treatment at the time I was injured, and the best was done for me that could be done. My ring finger and little finger of my right hand were normal previous to this accident, and there was no stiffness of my little finger. Since my injury I have no power in my little finger with which to grip tools.

Cross-Examination by Mr. Murphy

The WITNESS: I have now attained the age of twenty-two years. This accident occurred two years ago next month, or on October 30, 1933. Mr. Sears called me to this particular work on which I was some days later injured. I could not say if he told

(Testimony of Clifford Gilbert.)

me personally that I was to go to work or whether he sent word through Dr. Marquette, but I rode from town over to the shops with Mr. Sears himself. I went with my father when he delivered the truck to the Milwaukee Railroad, and between that time and the time I was engaged to drive the truck some other person was driving it. I could not say just how many days after the truck was delivered to the railroad company it was before I was called to take charge of it and operate it. I think it would be at least a week, though. [111] I went to work either on the 26th or 27th day of October, so I had worked at least three or three days and a half prior to the accident. I cannot say that I recall that at the time I was engaged to operate this truck that I was told by Mr. Sears or by Dr. Marquette on behalf of Mr. Sears that the Milwaukee Railroad was looking for an experienced person who was familiar with the truck to operate it. I heard no such statement, and I was not advised in any manner of that fact. I do not recall that it was communicated to me that I was wanted to drive the same truck that I had helped deliver to the railroad company. It was my mother who told me that my services were wanted, and I believe she told me that Dr. Marquette had so advised her; but I do not recall that my mother told me Dr. Marquette had advised her that the railroad company was looking for an experienced person who was familiar with the truck to operate it. During the three or four days pre-

(Testimony of Clifford Gilbert.)

vious to the accident that I was operating the truck I was engaged in the same work of taking debris, consisting of dirt and burnt timbers and rubbish of various kinds in the truck down to a place where it was dumped as waste, and that was the entire operation in which I was engaged. From time to time for a period of five or six years previous to this accident I had operated this same truck, but I was not its principal operator, as other persons, including my father, also drove it. I do not know if during the period of five or six years that I was from time to time operating this truck my father was doing the repair work on the truck and keeping it in condition. You will have to ask him about that. I did not assist him in this work, and I do not know whether he did any of that work or not. For the three or four days previous to the accident that I was operating the truck I did not find that it operated satisfactorily, for there was some- [112] thing wrong with it nearly all the time. It would boil and miss. On this particular trip on which the accident occurred I noticed some of the cylinders, or at least one of them, were missing, so I stopped the truck at a point about a hundred yards, approximately, from the point where I was to load the truck. I then got out of the truck and raised the hood. There is both a foot lever and a hand lever on the truck for the controlling of the flow of gas. On this occasion I was using the foot lever, and before leaving the truck I took my foot off that lever. The hand lever

(Testimony of Clifford Gilbert.)

was in a closed position at the time. However, the accelerator was in a position faster than an idling position, as the motor would not idle, so that at the time of the accident the motor was running above the idling speed. I do not recall of saying shortly after I was injured that I left the motor idling. I do not know the rated revolutions per minute of that motor, and I would have no idea of what they actually were at that time or whether they were four or five hundred or more or less. In an idling position the motor would run slower; and in the position I left the accelerator when I got out of the truck just before I was hurt the motor would be running at less than its rated revolutions. The radiator formed the dashboard of the truck, and from the driver's seat one could see the fan that was enclosed in the radiator and which revolved in a space or opening in the radiator. The fan operated by the revolving of a shaft or axle placed in the center of fins or blades, the fins or blades radiating from a central fixture. The fan was separated from the axle or shaft by a bearing of some kind, but I could not say whether these were ball-bearings or whether it was a brass bushing, or just what it was, as I never looked at the bearing. I would say the blades themselves, from the hub or axle to the tip of the blade, were each six or eight [113] inches long. I could not say how many blades were in the fan, but there were more than six. These blades are all integral with the hub or base or central point. I could

(Testimony of Clifford Gilbert.)

not say if the tips of the blades, at their circumference, were bound together by a piece of metal designed to hold them rigid. However, there is usually a metal band of some kind placed around the outside of such fans, connecting the tips of the blades all the way around and forming the circumference of the fan itself. I could not say that I noticed that when looking at the fan through the openings through which it could be seen, either looking from the motor side back toward the radiator and fan or from the seat of the cab forward toward the radiator and fan, that the tips of the fan blades and that band were not visible but were covered by a flange of a smaller circumference than the circumference of the band. I could not say that while driving the truck I paid much attention to the fan, so I do not know whether through that aperture I could see the band which was on the outer ends of the fins of the fan. Directly in front of the fan, on the engine side, are three cross members that are attached to the shell of the radiator, which radiator shell encloses the fan. I am not able to say whether the tips of the fan blades extend further into the radiator than these cross members. My first step in looking for the cause of the trouble the truck was experiencing just before the accident was to lift the hood of the engine, which raised from the front end and was supported by a brace adjustable for that purpose. On opening the hood I discovered that the number four pet-cock, which is the rear pet-cock or

(Testimony of Clifford Gilbert.)

the one nearest the radiator, was in an open position. This would have a tendency to cut down the compression and would interfere with the proper operation of that cylinder, as whatever went into the cylinder in [114] the form of gas could escape through that opening. I do not remember whether I opened the hood prior to that this same morning. I do not know how long I had been driving the truck that morning with this pet-cock open. I may have been driving it all morning in that condition, as I do not recall having previously lifted the hood that morning or of anyone else having lifted it. That open pet-cock might account for the cylinder missing, but it might also be heating and losing compression. The open pet-cock would, however, interfere with the smooth and orderly operation of that cylinder in conjunction with the other cylinders, and would account for some of the lack of smoothness and jerking. I do not remember whether I got the pet-cock closed or not. When I was preparing to close this pet-cock I was standing at the left-hand side of the motor looking toward the front of the truck, as the pet-cocks are on the left-hand side of the motor. I imagine the fenders of the truck are about three and a half feet high. From the outside moulding of the fender, where it is turned down, I would say it would be about two and a half feet to the pet-cock on the rear cylinder. There was no difficulty or strain in reaching over to manipulate that

(Testimony of Clifford Gilbert.)

particular pet-cock, and standing on the ground one would be able to reach it without losing one's balance or anything of that kind. I stood a little nearer to the tip of the fender than to the rear of it. I could not say if the tip of the fender is a little short of reaching to the front of the front wheel. This was not a cold morning. It may have been chilly to some people, but it was not chilly to me. When I began to manipulate the pet-cock or was about to manipulate it I had a glove on my right hand and I also had a ring on my finger. I could not say if after the accident the ring was embedded in my finger, or whether it was bent or [115] crushed so that it was difficult to take it off my finger. I cannot say that they attempted to take it off until they removed the finger. It was a metal ring of some kind, but I do not know just what it was. When I got the piece of metal identified as Exhibit 1 I did not pay any attention to the cross members which are directly in front of the fan, and I did not notice that the cross member to the left-hand side of the car, facing toward the front, was cracked, and I am not aware of its being cracked even up to the present time. About a month after the accident I saw the fan which was in the truck at the time of the accident. At the time I saw it it was in one of the shop buildings. The splash-pan of which I spoke is located near the bottom of the motor, and its purpose is to keep mud and water from splashing onto the motor. It is not under the motor, but is built on

(Testimony of Clifford Gilbert.)

the side of the motor about two-thirds of the way down. It does not extend under the motor at all. It keeps the water off the spark plugs and cylinders. I do not remember that I made any measurement of the distance from the fan blade to the pet-cock. In speaking of a distance of six or eight inches I am speaking just from my general recollection and familiarity with the truck. I spoke of a thumping noise in answer to questions put by my counsel, and not a humming noise. A humming noise would be natural. I also said there seemed to be a jerk or knock. This condition existed in the truck for the three or four days I drove it for the Milwaukee Railroad. I cannot say that I noticed this thumping noise some six months before. I know that six months before when I was driving it it was continuously breaking belts. The fan stops rotating when the belt breaks. The thumping noise was not at all noticeable at that time. I could not say whether the truck had been in service from the time I ceased driving it in [116] the spring of 1933 until it was turned over to the railroad company. So far as I know it had not been in service. I think it is a fact that my father and I are the two persons in Deer Lodge who knew most about this truck and were most familiar with it. After I was injured I made no further examination of the fan or the motor to see what had happened. After the accident I first went to the safety-first dress-

(Testimony of Clifford Gilbert.)

ing-room at the plant and had some preliminary treatment, and then Mr. Jones got his automobile and took me to the doctor's office, where the operation for the removal of my finger was performed. I have forgotten the name of the man who gave me the preliminary treatment at the dressing-room, but I believe it was Teddy Christiansen. I have no recollection of saying to either Mr. Christiansen or to Mr. Jones on that day and before I arrived at the doctor's office that I got my finger in the fan but did not know just how it occurred, nor do I recall of making substantially the same statement to the doctor at his office. Neither would I say that I made such a statement to Mr. Neumen, the Claim Agent for the railroad, several days after the accident. However, I would not say that I did not. I would not say that I did not make such a statement to Dr. Unmack, as the pain was so great I do not recall just what I said. I may have made such a statement to Dr. Unmack and to Mr. Jones. As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge. The gloves I was wearing at that time were kind of an orange color. The ring I had on was not a horseshoe nail that had been turned into the shape of a ring. It was a light metal ring, and was not gold or silver.

(Testimony of Clifford Gilbert.)

Q. On the 30th day of October, 1933, within an hour or two [117] after the accident to your hand, I will ask you whether in Dr. Unmack's office in the city of Deer Lodge, in the presence of Mr. Jones, one of the foremen at the work where you were employed, and Dr. Unmack, you did not say that you got your finger into the fan, or your hand into the fan, and that you didn't know how it occurred?

Mr. DAVIS: To which we object on the ground that it is repetition.

The COURT: The objection is overruled. This is evidently laying the ground for impeachment.

A. No.

Redirect Examination by Mr. Maury:

The WITNFSS: I recall definitely that I did not put my hand into the fan. I could not tell you into how many pieces the fan had broken when I saw it next after the accident. I would say about two thirds of the fan blades had pieces broken out of them. It was about a month after the accident that I examined the fan. When I went to Dr. Unmack's office I was in terrible pain. My finger was just hanging. I imagine the blades of the fan are about eight inches long. Between the pet-cock that I was reaching for and the blades of the fan were three small pieces of metal to which the shaft of the fan is fastened. I imagine these pieces of metal are ten to twelve inches long and an inch

(Testimony of Clifford Gilbert.)

and a half or two inches wide, and they were between where I was putting my hand and the revolving fan. One of the pieces ran up and down and the others crosswise, and they were all made into the casting of the radiator. The revolving fan was approximately two inches inside of those guards or coverings. The openings between those guards were eight or nine inches wide, I imagine. There is no possibility that I stuck my hand through those open- [118] ings and into the fan; and there was nothing in there that I had any purpose in reaching for.

Mr. MAURY: We offer in evidence this piece of metal, Exhibit 1 for identification.

Mr. MURPHY: We object to it as not being sufficiently identified.

The COURT: The testimony shows that it is not the identical piece——

Mr. MAURY: It is not the identical piece that struck, no. We do not claim that it is.

The COURT: It is similar, at least, to the material of which the fan is made, and I think it is admissible, although it is not definitely established that it is a piece broken from the fan.

Q. I will ask you if this is a piece of the fan that was in the Mack truck on the day that you were injured?

A. Yes.

The COURT: Do you wish to object to it now, Mr. Murphy?

(Testimony of Clifford Gilbert.)

Mr. MURPHY: I should like to ask one question in connection with that. When was that piece broken from the fan?

The WITNESS: At the time of the accident?

Mr. MURPHY: How do you know that? You found it thirty days later, did you not?

The WITNESS: Yes.

Mr. MURPHY: We object to it as not being properly identified.

The COURT: The objection is overruled.

(The piece of metal referred to was received in evi- [119] dence as Plaintiff's Exhibit 1.)

The WITNESS: When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger.

Re-cross-Examination by Mr. Murphy:

The WITNESS: Nothing that I know of or can account for happened just before the fan broke.

Q. I have been advised by my associate that I perhaps made an error in putting the question with reference to Dr. Unmack's office by saying that it was in the presence not only of Dr. Unmack but of Mr. Jones. I should like, with the permission of the Court, to modify the question and to repeat it by asking if, at the time indicated in the previous question and in Dr. Unmack's office, and in his presence, you did not then say that you had got your finger into the fan, or your hand into the fan, and that you didn't know how it occurred?

A. No.

JAMES GILBERT,

recalled as a witness for the Plaintiff, testified as follows:

Direct Examination by Mr. Maury:

The WITNESS: I obtained the piece of metal, Exhibit 1, from the Mack truck over at the Milwaukee shops. It is in exactly the same condition now as it was when I obtained it. There were lots of other pieces there, but this was lying out on the splash-pan and I picked it up. It was about an hour and a half after the accident that I got Exhibit 1, as I went right over to where the truck was as soon as Clifford came back from the doctor's office. The other pieces of the fan that I saw were down in the [120] bottom of the fan pan.

Cross-Examination by Mr. Murphy:

The WITNESS: I obtained Exhibit 1 from the truck about an hour and a half after the accident.

Q. Am I mistaken in thinking that the witness Clifford Gilbert testified that he had procured it thirty days——

The COURT: We do not care for argument at this time. He is not in a position to tell you whether you are mistaken. He can tell you what he knows about it, but he cannot give you his opinion.

Mr. MURPHY: In view of my understanding of the testimony we renew our objection to the introduction in evidence of Exhibit 1.

The COURT: The renewed objection is overruled.

JOHN TRUSCOTT,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is John Truscott, and I live at Deer Lodge, Montana. I am in attendance here as a member of this jury panel. You asked me some questions at luncheon about this case. I was passing through the Milwaukee yards shortly after the accident to Clifford Gilbert, and I saw his hand after it had been dressed. This was on the premises of the Milwaukee Railroad. I saw Clifford Gilbert leaving when he was taken away. I examined the fan after the accident, and I noticed that there were about six blades on the fan and that four of them were broken. While I would not say that the material in Exhibit 1 is exactly the same as the material in the fan, it looks very much like it. I [121] came here very reluctantly as a witness.

Cross-Examination by Mr. Murphy:

The WITNESS: I was not present at the time of the accident, but I saw Clifford Gilbert as he was leaving the scene of the accident. I was within one hundred feet of him at the time I first noticed him. I saw the condition of the fan, as the hood was still up and through the opening I could see the fan blades were broken. This was within a few minutes after the accident. I did not look down into the fan housing, so I did not observe any of

(Testimony of John Truscott.)
the broken pieces of the fan down in there. I saw one or two pieces on what would be called the splash-pan. Probably I was not closer to the fan than six feet. I just noticed the fan was broken and then went on. I did not notice that one of the cross members in front of the opening through which the fan stream flows was cracked.

Redirect Examination by Mr. Davis:

The WITNESS: By the splash-pan I mean the pan on the sides of the motor which prevents mud and water from being splashed from the road onto the motor, and it was in this splash-pan that I saw these pieces of metal. There may have been other pieces in the fan housing, but I did not observe them. I did not notice the pieces of metal on the splash-pan particularly, but I noticed they were pieces of this cast aluminum fan. One of them, I remember particularly, was a parallelogram, probably two inches each way, and the other was two inches by three and a half or four inches.

THE PLAINTIFF RESTED [122]

DEFENDANT'S CASE

EDWARD SEARS,

previously called and sworn as a witness for plaintiff, was called as a witness on behalf of the defendant and testified as follows:

(Testimony of Edward Sears.)

Direct Examination by Mr. Garlington:

THE WITNESS: My name is Edward Sears. I testified in this case on behalf of the plaintiff. I am Division Master Mechanic for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and I am located at Deer Lodge, Montana. After the fire at the Milwaukee shops, which occurred October 21, 1933, it was, of course, necessary to re-establish some of our work and clean up the debris caused by the fire. Mr. McLeod was there representing the Bridge and Building Department, and I represented the mechanical department. Mr. Jones is my mechanical superintendent, and he was taking care of mechanical repairs and supervising that part of the work. On the 30th day of October, 1933, Mr. Jones was in charge of the cleaning up operations. Mr. McCormick, representative of the locomotive department, was also there. I cannot tell you if Mr. McLeod was there representing the B. & B. Department on that day or not. Prior to that time I had obtained a Mack truck from the city of Deer Lodge. The superintendent was anxious to have this debris cleaned up as fast as possible, and he asked me about getting dump trucks. First we got in touch with some men who were doing some road building, but they were leaving and we could not get their trucks. Then I got in touch with the Mayor of Deer Lodge, and he offered us the use of the city truck, which was this Mack dump truck, and the truck was later delivered to the

(Testimony of Edward Sears.)

Milwaukee premises. When the truck was delivered to us Mr. McLeod, the foreman of the Bridge and Building Department, assigned a young man, Mr. Schurman, I believe, to [123] operate the truck. Mr. Schurman was a member of the bridge and building gang and an employee of the railroad company. I do not know how long he had been in the employ of the railroad or whether he had previously been working around the Deer Lodge railroad yards. Mr. Schurman began hauling debris from the northwest corner of the shop where we were reconstructing a portion of the roundhouse. No complaint was made to me concerning the condition of the Mack truck prior to October 30, 1933. Then I believe Mr. Schurman and the gang with which he was working were sent to some other point and another man was assigned by Mr. McLeod to drive the truck, but this other man did not seem to have the necessary ability to be a truck driver. Then I hunted up Dr. Marquette to learn if he could tell me of a man competent to drive the truck, and Dr. Marquette put me in touch with the plaintiff, Clifford Gilbert. The plaintiff may have ridden back to the plant with me, I am not sure, but in any event he was at the plant very shortly afterward, and he was placed under Mr. McLeod and on his payroll. On the morning of October 30, 1933, between nine and ten o'clock, I believe, I was over in the farther part of the grounds with Mr. McCormick when I was told there had been an accident

(Testimony of Edward Sears.)

to Mr. Gilbert. Mr. McCormick and I walked over towards the storeroom where the car was parked and observed the broken fan in the truck. Later on I went to the doctor's office to see how bad Mr. Gilbert's injuries were. Dr. Unmack and Gilbert were in the office, and I saw Gilbert there on the operating-table and observed his injured hand. His finger was very badly mangled and I cannot say whether I observed a ring on his finger or not. Then I returned to the plant, and later on Mr. Jones, Mr. McCormick and I jointly looked at the truck and noticed that several blades of the fan were broken and that [124] the fan was jammed, the broken blades of the fan having got between the outer edge of the other blades and the core of the radiator. I did not observe the fan belt. Since the 30th day of October, 1933, this truck has been stored at the Milwaukee shops in Deer Lodge. The broken parts were cleared from the fan housing and the truck was used for a short time, I do not remember just how long, after the accident with the broken fan in it. I cannot state positively, but I think it was Mr. Schurman who drove the truck after the accident. A new fan was ordered and when it arrived it was installed in the truck so that the truck could be returned to the city in the same condition it was when we got it. Mr. Hulben, a machinist, performed the work of installing the new fan and the work was supervised by Mr. Jones. Both these men are employees of the Milwaukee

(Testimony of Edward Sears.)

Railroad. I have no personal knowledge of what parts of the old fan and what parts of the new fan were used in the installation. I only know from what they told me.

Q. At any time after the injury did the plaintiff make any statement to you as to how this accident happened?

A. I believe it was on the following day that Mr. McCormick and I visited the young man at his home to see how he was getting along, and at that time we asked him if he had any idea how he got hurt. He told us he was closing this so-called priming cock and had his hand injured. He didn't seem to have any——

Mr. DAVIS: We object to that as the opinion of Mr. Sears.

Q. Yes. Just tell us what he said—what his words were.

A. He couldn't give us any——

The COURT: That is a conclusion. The question is what words did he say or use. Give us the words the [125] plaintiff used in your presence at that time and place.

The WITNESS: He didn't seem to know just how it happened.

Q. You can't repeat the words that he used?

A. I don't believe I could at this time; not under oath.

(At 4:55 p. m. o'clock of Friday, September 27, 1935, a recess was taken until the following

(Testimony of Edward Sears.)

morning, Saturday, September 28, 1935, at ten o'clock a. m.)

The WITNESS: I have seen Exhibit 2 for identification before. It is a part of the truck in question and was removed from the truck which is at the Milwaukee shops and brought here. It is in the same condition now that it was at the time of the accident with the exception that a new fan has been installed in it.

Q. Otherwise would you say that the entire exhibit is in the same condition?

Mr. MAURY: We can save time. Let it be introduced.

Mr. GARLINGTON: We will offer it in evidence.

The COURT: By consent of counsel and without objection Exhibit 2 is admitted in evidence.

(The exhibit, consisting of the complete radiator and fan assembly, was received in evidence as Defendant's Exhibit 2.)

The WITNESS: Exhibit 3 for identification is the fan that was in the radiator which is part of Exhibit 2 at the time of the accident. In other words, Exhibit 2, at the time of the accident, was in exactly the same condition as it is now with the exception that Exhibit 3 for identification was in it instead of the new fan.

Mr. GARLINGTON: We should like to offer in evidence Exhibit 3 for identification. [126]

Mr. MAURY: Along with the fan belt?

(Testimony of Edward Sears.)

Mr. GARLINGTON: We do not propose to introduce the fan belt, although it may be marked and identified.

Mr. MAURY: That is the old fan belt?

Mr. GARLINGTON: Yes, that was in there.

Mr. MAURY: Well, that should go in, I think, with the fan.

Mr. GARLINGTON: If the Court please, it is our position that the fan belt had no part in this controversy and it is not our desire to offer the fan belt.

Mr. MAURY: Well, it is our desire to get everything that the jury wants to see before the jury.

The COURT: Of course, I have no control over the practice followed by counsel in presenting his case. You would have a right to take up on cross-examination the matter of the fan belt and the rotor on which the fan apparently ran, and those can go in on cross-examination. Is there any objection to Exhibit 3?

Mr. MAURY: None whatever.

(The exhibit, being the damaged fan, was received in evidence without objection as Defendant's Exhibit 3.)

Mr. MURPHY (handing four photographs to Mr. Maury): We desire to say that these pictures have been taken but recently, but they are a fair representation of what they purport to show at the time of the accident.

Mr. MAURY: These may be introduced as fair representations of the old truck.

(Testimony of Edward Sears.)

The COURT: The photographs, four in number, are admitted in evidence by agreement of all parties expressed in open court as a fair representation of the automobile [127] involved in this case.

(The photographs were, without objection, received in evidence as Defendant's Exhibits 4, 5, 6, and 7.)

The WITNESS: I looked at the truck both before and after I went to the doctor's office on the day of the accident, although we made a more thorough examination on the second occasion. On inspecting the radiator and the fan I noticed that pieces were broken out of the fan blades and that there was a crack in the cross-arm which I will designate the right-hand cross-arm as you look at the truck from the front. At this point, which is approximately two inches from the extreme right of the right-hand cross-arm I saw a mark from a glove finger with a little fuzz at that point. It was sort of short fuzz that I would say was from a glove. Opposite the place where I saw the finger mark I saw these pieces broken out. It would be hard for me to say just what the color of this fuzz was, but it was, I believe, a brown color. All the broken pieces of the fan that I saw at that time were inside the fan housing, some of them being between the fan and the radiator coils, as the fan had been jammed by these broken pieces. The Milwaukee Railroad provides safety rules for its employees in each department.

(Testimony of Edward Sears.)

Q. I will ask you whether or not there were any rules in force governing the maintenance of way and structures department of the Milwaukee Railroad?

Mr. MAURY: We object, unless those rules were brought to the notice of this plaintiff.

Mr. MURPHY: It is not for the purpose of showing that there was a violation of the rule by the plaintiff in this case. We have no intention of that kind, because we have not pleaded he violated any rule or was guilty of [128] any negligence in that regard. The purpose of its introduction is to show that there was a rule and that there was a manner of giving notice to the defendant of defects and what should be done if defects were discovered or known.

Mr. MAURY: We object to it as not material to this case. The standard of conduct of ordinary persons is the standard here, and not what standard the railroad company might have erected for itself.

The COURT: May I ask whether the defendant's position is that this plaintiff was at that time engaged in railroad business?

Mr. MURPHY: He was an employee of the railroad.

The COURT: Engaged in the operation of a railroad?

Mr. MURPHY: He was not engaged in the operation of a railroad, but he was doing work incidental to the railroad work.

(Testimony of Edward Sears.)

The COURT: It appears to me that in view of the circumstances shown by this case—that the plaintiff was employed but four days prior to the injury complained of—the defendant should be required to show that the plaintiff had some notice or knowledge that rules were in effect as promulgated by the defendant, or that he had some knowledge of the specific rule upon which the defendant relies here.

Mr. MURPHY: May we reserve the right to make an offer of proof later?

The COURT: Yes; and you may submit authorities and I shall be glad to receive them.

The WITNESS: After the accident the broken parts of the fan [129] were cleared from the housing and the truck was used again. Later a new fan was installed so that the truck could be returned to the city when it called for it. The new fan as installed is not in Exhibit 2. To my recollection I had no conversation with the plaintiff as to the manner of the occurrence of his injury.

Cross-Examination by Mr. Maury:

The WITNESS: At the time I picked up the pieces broken from the fan belt I could not say whether I found the piece that is broken out of the fan blade on Exhibit 3, being the piece from the largest fracture on Exhibit 3. The pieces that I picked up were turned over by me to Mr. Neumen. Mr. Neumen is the Claim Agent for the Railroad Company.

(Testimony of Edward Sears.)

Mr. MAURY: Are those pieces that Mr. Sears found here at the courthouse now?

Mr. MURPHY: No, they are not.

Mr. MAURY: Where are they?

Mr. MURPHY: I don't know. We were not abe to bring them here.

The WITNESS: Those pieces were gathered up and placed in a large envelope, which was kept in the office of the Company at Deer Lodge for probably sixty days or such a matter, and then the pieces were given to Mr. Neumen, the claim agent; and, so far as I know, Mr. Neumen took the pieces away with him. I think this fan, Exhibit 3, is now in the same condition as when I first saw it, except that there was an outer ring on this side, the same as is on the new fan in Exhibit 2. The parts of that ring were given to Mr. Neumen in that same envelope. These blades on the fan are called vanes. One of these vanes on Exhibit 3 is broken entirely away; another one is broken almost entirely away. The dimensions of the pieces broken out of the other vanes are, [130] for this one, three and three quarters inches across and an inch down; for the next one, four and a quarter inches and about an inch and one sixteenth; the next one, three and a quarter inches and about an inch and one sixteenth; and the next one, three and three quarter inches and about an inch.

Q. Now, the next one?

A. That is where the ring was broken off here.

(Testimony of Edward Sears.)

Mr. MAURY: We move to strike out that answer.

The COURT: The motion is granted.

The WITNESS: The next one is one inch by five eighths; the next one is hard to estimate, but I would say seven inches, and the greatest depth is about three inches; and the last one is four and a half inches and about three inches, triangularly shaped. That metal is three sixteenths of an inch in thickness. This ring that was about the outside circumference of the blades was broken out in sections from between the vanes that are broken out. I imagine the weight of the fan before it was broken was about twenty pounds. It is aluminum. At the full speed of the engine I imagine that fan would run about six hundred revolutions a minute. The box or piece enclosing the fan is just the same as it was the first day we saw it after the accident. It has not been changed a bit, and except for the new fan it is now in the same condition that it was immediately after the accident. The fan revolves clockwise. So far as I know the belt was not off the fan after the accident.

Q. Is this the belt that was running that fan (showing the witness Exhibit 9 for identification)?

A. It is with the exception that we had to cut——

Mr. MURPHY: We object to this examination as not being proper cross-examination, and for the further rea- [131] son that there is no connection in this case with any action or condition of the belt

(Testimony of Edward Sears.)

and the injury claimed and the method or manner of the accident which is the subject of the lawsuit.

The COURT: The objection is overruled.

A (Continued) It is the same fan belt with the exception we had to cut it to get it off. You couldn't remove it otherwise.

The WITNESS: Except for being cut, the fan belt is in the same condition it was after the accident.

Mr. MAURY: We offer it in evidence.

Mr. MURPHY: We object to the offer for the reason that in the condition of the plaintiff's case it is apparent that no action of the belt and no condition of it in any manner connected with or contributed to the injury complained of.

The COURT: The objection is overruled.

(The fan belt was received in evidence as Plaintiff's Exhibit 9.)

The WITNESS: Having placed Exhibit 1 in place in the broken blade of the fan, Exhibit 3, into which it seems to fit, I would say that as nearly as any human being can state Exhibit 1 is a part of Exhibit 3.

The WITNESS: Our counsel asked me a question and I didn't answer it quite correctly.

The COURT: Just a moment. I think counsel will take care of the defendant's case.

Mr. MURPHY: In view of the witness's statement we should like to ask another question.

[132]

(Testimony of Edward Sears.)

Redirect Examination by Mr. Garlington:

Q. Earlier this morning I asked you whether or not you had had a conversation with the plaintiff with reference to the manner in which this injury occurred. I will ask you if that is the matter to which you refer as being a question which you did not fully understand or correctly answer?

Mr. DAVIS: We object to this on the ground that it is repetitious.

Mr. MURPHY: We simply want this witness to put himself right if he made any misstatement. The particular conversation was excluded by a ruling of the Court, and we, of course, accept that ruling and will not go into the question of the conversation or its purport.

The COURT: Will you refer to that testimony?

(The reporter read as follows:)

"Q. At any time after the injury did the plaintiff make any statement to you as to how this accident happened?

"A. I believe it was on the following day that Mr. McCormick and I visited the young man at his home to see how he was getting along, and at that time we asked him if he had any idea how he got hurt. He told us he was closing this so-called priming cock and had his hand injured. He didn't seem to have any——

"Mr. DAVIS: We object to that as the opinion of Mr. Sears.

"Q. Yes. Just tell us what he said—what his words were.

"A. He couldn't give us any——

(Testimony of Edward Sears.)

"The COURT: That is a conclusion. The question is what words did he say or use. Give us the words the plaintiff used in your presence at that time and place.

"The WITNESS: He didn't seem to know just how it happened. [133]

"Q. You can't repeat the words that he used?

"A. I don't believe I could at this time; not under oath."

The COURT: As I understand the position of counsel, you do not intend to develop this matter any further?

Mr. MURPHY: No; because the Court has already ruled upon it.

Mr. MAURY: We withdraw our objection.

Q. Just answer yes or no.

A. Repeat the question please.

(The reporter read as follows:)

"Q. Earlier this morning I asked you whether or not you had had a conversation with the plaintiff with reference to the manner in which this injury occurred. I will ask you if that is the matter to which you refer as being a question which you did not fully understand or correctly answer?"

A. Yes; I talked to him.

Q. Just a moment. Answer yes or no.

A. Yes.

(Testimony of Edward Sears.)

Examination by The Court:

Q. There is a matter I want to be clear on. As I recall it, you said that you gathered up all the broken parts of the fan, put them in an envelope and preserved them in the office of the defendant corporation for a period of sixty days and then delivered them intact to Mr. Neumen, the claim agent for the defendant corporation. Now, will you kindly tell me what the duties of Mr. Neumen were and are?

A. Mr. Neumen is our claim agent.

Q. Yes; but what are his duties?

A. His duties, in cases of injuries, is to investigate those cases as to the cause of the injury and to collect such informa- [134] tion as he can pertaining to the injury.

Q. And to gather, I assume, what evidence he can for presentation to the court?

A. Correct.

Q. As I recall it, you further stated that the broken parts of the fan cannot be produced here?

A. So Mr. Neumen advises.

E. A. McLEOD,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is E. A. McLeod, and I reside at Butte, Montana. I am chief carpenter for

(Testimony of E. A. McLeod.)

the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I know of a fire that occurred at the Milwaukee shops at Deer Lodge in October, 1933, and I was on the scene of the fire possibly two hours later. I immediately moved in two bridge crews, and with the aid of a couple of clam-shovels we started cleaning up and removing the debris from the fire. I do not know just when the truck was procured from the city of Deer Lodge. It was on the ground when we started to work there. We used it for hauling away scrap. I selected Albert Schurman, one of my gang, to operate the truck, as I found out that he had had experience at that kind of work and knew how to handle trucks. He also operates our motor-car on the railroad. In my judgment he was the best man available for the job. He operated the truck for three or three and a half days, or something like that, during which time it came and went regularly on its trips.

Q. Was any complaint made to you by Schurman—— [135]

Mr. MAURY: We object to that as not material.

The COURT: The objection is sustained.

The WITNESS: Then Mr. Schurman left and I picked another man, James Crosley, to operate the truck. He had operated small trucks, but he could not handle this truck satisfactorily and I was afraid he might hurt somebody, so I went to Mr. Sears and asked him if he could get me an experienced truck driver who could handle that

(Testimony of E. A. McLeod.)

particular truck. Then Mr. Sears sent Mr. Gilbert, the plaintiff, to me, and he drove the truck for me for about two days, or until our end of the work was finished. During the time he drove the truck for me the plaintiff made no complaint to me with reference to the truck. The truck came and went regularly on its trips and worked satisfactorily in the removing of the debris. I was in Butte on the morning that the plaintiff was injured.

Cross-Examination by Mr. Davis:

The WITNESS: I entered the employ of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company in 1909, and I am now head carpenter. My gang maintains all the bridges, buidings, culverts, water-tanks, stock-yards, and so forth. In the event of a fire and a necessity to reconstruct buildings and remove debris, our department would participate in that. When I heard of the fire I went to Deer Lodge as quickly as I possibly could, as it was the duty of my department to see the debris was cleaned up and out of the way, and that we made ready for our building work. It was the machine shop that was destroyed by the fire. This is the building in which repairs were made to the motors and engines. I could not give you the dimensions of the buildings. The roundhouse and machine shop were conducted in conjunction with each other, and it was in these buildings that the [136] engines, which probably could be called main-line engines, were repaired and maintained.

(Testimony of E. A. McLeod.)

Q. Would they be engines that transported passengers and materials and freight from state to state?

Mr. MURPHY: I think we shall object to this line of questioning as not being proper cross-examination.

The COURT: The objection is sustained.

The WITNESS: I believe there was some machinery in the buildings that burnt down.

Q. Did you rebuild those buildings?

Mr. MURPHY: We make the same objection, that it is not proper cross-examination; and it is a part of the plaintiff's case, which is concluded.

The COURT: I believe that is right. You can make the witness your own witness and inquire into those matters.

The WITNESS: Mr. Schurman was an experienced truck driver, and it was not because his work was not satisfactory that he was taken off the truck, but because his crew was moved to Bonner, about fifty miles west of Deer Lodge. After he left James Crosley was put on the job and drove the truck for possibly two hours. He did not handle the truck to suit me and I was afraid somebody might get hurt. He did not have any trouble with the engine. His trouble was in handling the truck. He told me he had had experience in driving small trucks, Fords, I believe. I did not want anybody to get hurt so I removed him from that particular job. He is still working

(Testimony of E. A. McLeod.)

for me. Then I told Mr. Sears I would have to have an experienced truck driver. There was nothing about this particular truck that caused me to ask for an experienced truck driver. I would have done the same thing with [137] any truck. After I talked with Mr. Sears the plaintiff was sent to me, and he drove the truck. I was not at Deer Lodge the day the plaintiff was injured.

J. O. JONES,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is J. O. Jones, and I reside at Deer Lodge, Montana. I am mechanical supervisor for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Deer Lodge. I was in Deer Lodge at the time of the fire that destroyed the Milwaukee shops. As a result of this fire it was necessary that the debris be cleaned up, and in this work I observed a Mack truck being used. The first man who drove this truck was Schurman, who was employed in the Bridge and Building Department under the supervision of Mr. McLeod. I think he drove the truck for three days. Then Mr. Schurman's crew left and another driver whose name, I believe, is Crosley was taken out of Mr. McLeod's gang to operate the truck. Crosley

(Testimony of J. O. Jones.)

was not satisfactory as an operator and Mr. McLeod asked Mr. Sears to get an experienced driver, as a result of which the plaintiff came to drive the truck. I think the plaintiff started to drive the truck on Saturday and was injured on Monday, so he drove the truck about two days and a half. I saw the truck coming and going while he was driving it. The day the plaintiff was hurt I was making my regular tour of inspection and I had just come out of the power-house when I saw Clifford Gilbert and Carl ZurMuehlen, and I was informed that Gilbert had been hurt. I told Mr. ZurMuehlen to give Mr. Gilbert first aid at the storehouse office and I would get my car to take [138] Gilbert to the doctor's office. I got my car and took Gilbert to the doctor's office. He and I were along in the car. I asked Gilbert how the accident happened, and he told me he was doing something with the priming-cocks and that somehow he got mixed up with the fan. He did not know just how the accident happened. I stayed at the doctor's office with Gilbert until the doctor came, and then I left him in the doctor's care and went back to the shop. When I got back I made a casual examination of the truck to see how the accident happened, but after the lunch period Mr. Sears and I made a joint examination of the truck. We examined the radiator, which is part of Exhibit 2, and also the fan, Exhibit 3, which, at that time, was in the radiator. On an inspection of the fan I

(Testimony of J. O. Jones.)
found a number of pieces broken out of the vanes. Some of these pieces were in the bottom of the race, while others were jammed in there. There were different size pieces, some of the pieces having been broken up into smaller pieces. Looking from the motor towards the radiator to the right side of the cross member, and about an inch and a half from the outside of the inside of the race, there was a crack which is now visible here on Exhibit 2 (the witness pointing to what he terms a crack); and on the bar there, about two inches toward the center from the crack, there was an indication of some fuzz, sort of light brownish in color. I do not know from what it had come off, but it was like something off a glove or piece of cloth. That is about all I observed. Immediately after the accident the pieces of fan were removed and the truck was used for a few days with the broken fan still in it. I think it was used for three days in that condition, and I think that Mr. Schurman drove it during that time. It was not used afterwards with the broken fan in it We ordered a new fan for the truck [139] immediately after the accident, and as soon as it came the shop force installed it under my supervision. Sam Hulben, a machinist, did the work.

Q. Will you tell the Court and jury just exactly what it was that was done?

A. When the new fan arrived the outer race or bushing, as you might call it——

(Testimony of J. O. Jones.)

Mr. MAURY: The exhibit agreed to as having been correct, we do not see the materiality of what they did.

The COURT: Not unless it develops the condition they found during the operation.

Mr. GARLINGTON: That is our contention.

A. (Continued) It was found on the arrival of the fan that the outer race or bushing, you might call it, wasn't exactly in accordance with this old shell. It was necessary then to shove the bushing out of the new fan, and we applied the——

The COURT: I do not think that is material. I will permit testimony with reference to the old fan, the housing, or bearing, or anything existing at the time of the accident; but it appears to me that the fact that they ordered the wrong fan would have no bearing on the situation.

Mr. GARLINGTON: It is our intention to develop the fact that all of the original bearings and parts of the old fan are still in this Exhibit 2, except for the blades of the new fan.

Mr. MAURY: We have admitted all that.

The COURT: In view of that I do not see any reason for the testimony. It encumbers the record.

Mr. GARLINGTON: Our purpose is to demonstrate that [140] with the original equipment in the exhibit, as it is now, the worn and defective condition which was testified to by the plaintiff's witnesses is not present.

Mr. MURPHY: Or, at least, to show what the condition is.

(Testimony of J. O. Jones.)

The COURT: You might ask him about that. You are asking him about installing the new fan. The Court's ruling is that you may show the condition of the old fan or the bearing or anything connected with it.

The WITNESS: In connection with the removal of the old fan and the installation of the new fan I had occasion to examine the various parts of the old fan, including the bushing or outer race of the roller-bearings, the roller-bearings, and the shaft.

Q. What was the condition of the shaft on which the old fan rotated?

Mr. MAURY: We object. The shaft itself is the best evidence.

The COURT: It is the best evidence if the average man would understand it. I do not know whether the jurors can, from an examination of a piece of steel, judge whether it is in good condition. He can testify to the parts as he observed them as an expert. It is merely a matter of opinion.

A. In my opinion they were good—in good shape, just as they are now.

The WITNESS: The ball-bearings and the outer race were in good shape. The only reason we did not use the outer race that came with the new fan is that it did not match up with the old ball-bearings. Each of those parts is now in Exhibit 2, and the new fan now in Exhibit 2 rotates upon those parts to which I have re- [141] ferred to. In my

(Testimony of J. O. Jones.)

opinion the rotation of the fan as it is in Exhibit 2, in its present condition, is identically the same as the rotation of the fan, Exhibit 3, in Exhibit 2 prior to the time Exhibit 2 was repaired. My reason for this opinion is that we merely pushed the new bushing out of the new fan and put the old one back in the same fit, which would practically make no difference on the inside bearing or race whatever. It is my opinion that the old fan, Exhibit 3, rotated on its shaft in the radiator in the same manner that the present fan now rotates, and that in so far as the shaft, the ball-bearings and the race are concerned, the wobble and end-play, if any, now in Exhibit 2 is just the same as it was when the old fan was a part of Exhibit 2, because, outside of changing the bearings, there is no adjustment to make. This one break in the vane of Exhibit 3 is a newer break than the others, and is what I would term a fresh break.

The COURT: Just take a red pencil and mark that place where he says the fresh break is.

(Counsel marked with red pencil the edges of the break near where the particular vane joins the hub.)

The WITNESS: I do not think the vane now marked by a red-pencil mark was broken at the time Exhibit 3 was removed from the truck and replaced by the new fan. The edges of these other breaks disclose oil and dirt on them, resulting from what we term as "age of a break." Some of that could

(Testimony of J. O. Jones.)

be caused by using the fan in the motor. This break marked with the red pencil does not disclose the same age as these other breaks. From my experience it would be my opinion that this fan was not used in the motor since the break in the vane marked with red pencil occurred. This truck, with the broken fan, Exhibit 3, in it, was used for [142] about three days after the accident. (The witness tests Exhibit 2 for wobble or end-play.) There is no lift and there is about one thirty-second of an inch end-play. It is necessary to have some end-play in order to keep it from running warm, and you could properly have very little less end-play than that. There is no wobble present. This same condition would be present if the fan were being operated in the motor. The wobble, when present, would naturally be controlled by the bearings, and the end-play is a matter of the space between the ends of the fan and its housing. Assuming that the frame were rigid, the wobble and the end-play would be controlled by the shaft, the bearings and the race.

Cross-Examination by Mr. Davis:

The WITNESS: We did a pretty good job of putting the new fan in. However, there was nothing to do except to put it back as it was. I think the play of one thirty-second of an inch makes it mechanically correct. I had not inspected or examined the fan as it ran in the truck prior to the accident to Mr. Gilbert. If a wobble were present

(Testimony of J. O. Jones.)

in such a fan, it is my opinion that such wobble would be caused by a worn shaft or worn bearings. It could have been possible, with lack of lubrication, that bearings that had run in this fan for twenty years might be worn. I could not say whether, if lubricated, the bearings would show any appreciable wear after fifteen years. When we rebuilt the fan we did not use the outer race that came with the new fan, nor did we use any new bearings. In other words, all the bearings that are now in Exhibit 2 are the same bearings that were in the old fan.

Q. Showing you Plaintiff's Exhibit 9, I will ask you if you know what that is? [143]

A. Yes, sir.

Q. What is it, Mr. Jones?

Mr. MURPHY: We object for the reason that it is not proper cross-examination; and this belt, we contend, has so far had no connection with the accident claimed and for which suit is brought.

The COURT: I think the fan belt has a connection with the fan and the condition of the motor at the time of the accident. The objection is overruled.

A. That is a fan belt.

The WITNESS: This fan belt was removed from the truck by Mr. Sears before we came over here. It is now in the same condition it was before being removed, except that it had to be cut in order to remove it. Those worn portions of the

(Testimony of J. O. Jones.)

fan belt were present when the belt was removed. They are due, as far as I can see, just from the fan being in service. This wearing would not, in this case, be due to a wobbling of the fan. A wobbling of the fan would probably cause a different kind of a wear. In my opinion the break in the vane marked by a red pencil is a newer break than the other breaks in Exhibit 3. Exhibit 3 was in the master mechanic's office for a time after the accident, and then it was turned over to Mr. Neumen, claim agent for the Milwaukee Railroad, who gathers evidence and in conjunction with the attorneys prepares cases for trial for the Milwaukee Railroad. This Exhibit 3 has not been out of the possession of the Milwaukee Railroad since the accident, that I know of. So far as I know none of these pieces were broken from the vanes of Exhibit 3 prior to the accident, although I did not inspect the fan before the accident. These pieces broken from Exhibit 3 were turned over to Mr. Neumen and kept by him some place. I do not know why [144] they are not now in court. When I took Clifford Gilbert to the doctor the ring was still on his finger. The break on Exhibit 3 which I have marked as A-1 I consider to be one of the first or oldest breaks. With the exception of a little piece that is newer than the rest, I consider the break which I have marked as A-2 to be another one of the oldest breaks. I also consider those breaks which I have marked as A-3 and A-4 to be others of

(Testimony of J. O. Jones.)
the oldest breaks. The break which I have marked as A-5 I consider to be a little newer than the other breaks. The break which I have marked A-6 I consider to be an old break. Those breaks which I have marked as A-7 and A-8 I consider to be newer breaks. Those that I have marked A-9 and A-10 appear to be newer breaks and of about the same age. I do not recollect whether the two cracks which appear in the outer circumference near the point which I have marked A-10 were present shortly after the accident. I have placed these breaks which I have marked into three divisions, designated respectively as old, new, and newer, because of their appearance. These breaks in time start to darken, and newer breaks show a brighter edge. It is my opinion that the breaks which I have designated as old breaks occurred at the time of the accident, and that those which I have designated as new or newer breaks occurred after the accident. I did not state to Mr. Garlington that this fan, Exhibit 3, was operating in the truck following the accident in the same condition as we now find it. It was operated after pieces were broken out of it, but some of those pieces that are now out of it were still intact. These tubes, which form the cooling part of the radiator, are in the same condition now that they were at the time of the accident. If I am not mistaken, there is a shield between these tubes and the vanes of the fan, but otherwise the vanes of the fan are [145] pretty

(Testimony of J. O. Jones.)

close to the tubes. The only pieces of the fan vanes that I saw were found in the fan housing. I did not see any pieces of the fan in the splash-pan. I would say I saw eight or ten pieces which, in my opinion, were broken from this fan. I do not know that anybody inspected this fan after the truck was placed in service and prior to the accident. At the time of my conversation with Clifford Gilbert following the accident, in which he said he did not know how the accident happened, his hand was badly mutilated, there was blood, and he was in pain.

CARL ZURMUEHLEN,

called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is Carl ZurMuehlen, and I reside at Deer Lodge, Montana. I am tool foreman for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Deer Lodge. I recall the conditions at the railroad shops in Deer Lodge following the fire of October, 1933. During the cleaning up operations I was straw-boss and had some men under me, and during the time of these clean-up operations I noticed Clifford Gilbert driving a truck back and forth. I recall when he was injured, and at that time I was probably 250 feet away from the place of accident. I am the first

(Testimony of Carl ZurMuehlen.)

aid man in the mechanical department of the Deer Lodge shops. Immediately after the accident one of the men came running over to me to tell me there was a man hurt. I immediately walked over towards where Gilbert was, and he was coming towards me. I think Mr. Dildine was with him. I met him just at about the edge of the machine shop, and just as I got there Mr. Jones came along. We saw that Gilbert's hand was badly hurt, and Mr. Jones told me [146] to take care of Gilbert and wrap him up and he would get a car. When I first saw Gilbert following the accident the finger of the glove on the fourth finger, or the finger that is cut off, was ripped off, and that part of the glove covering the fifth or little finger was badly torn, and the back of the glove was torn. One finger of the glove was missing. I would call the color of the glove a light brown. My first aid kit was burned up in the fire, and I knew they had one at the storeroom office, so I took Gilbert over there. First I got a pair of scissors and cut off his glove. Then I saw that he had a ring on his fourth finger and that that finger was badly mutilated. In fact, it was just hanging, with the skin, you might say, holding it on. The little finger was badly hurt, and I did not know if they would even save that. I immediately bandaged and wrapped his hand and threw some cotton around it and then some more bandages so he could be taken to the doctor. His hand was bleeding badly. I escorted Mr. Gilbert

(Testimony of Carl ZurMuehlen.)

from the storeroom office, and immediately Mr. Jones came. I turned Gilbert over to Mr. Jones, and I suppose he took him to the doctor. At any rate, they left in the car. I then went over to the Mack truck to examine it. I looked at the fan and saw that the vanes had been broken off and that the pieces were lying in the bottom of the case, between the fan and the coils of the radiator. I also noticed a crack in this cross member (indicating a cross member on Exhibit 2) about an inch and a half from the right end of the cross member. Around the shops we use white cotton gloves, smooth on the outside, but the glove Gilbert had on was just the opposite, smooth on the inside with fuzz probably one eighth or three sixteenths long on the outside, being sort of an imitation of fur but made of cotton; and right on top of this cross member, about two inches in towards the center of the [147] car, was fuzz off of the glove.

Cross-Examination by Mr. Maury:

The WITNESS: I have been working for the Milwaukee Railroad for more than twenty-four years. I am tool foreman. I have charge of all tools and repair of machinery, under Mr. Jones. This mark that you refer to as a scratch and which appears to me to be a piece of welding was on the other side of the motor when I examined the fan after the accident, and I did not see it. I was on the left-hand side of the motor, and this was on the other side, so I could not see it. I think that

(Testimony of Carl ZurMuehlen.)

Exhibit 2 is now in exactly the same condition it was immediately after the accident, except that a new fan has been installed. I do not know what became of the radiator cap. I am sure I had nothing to do with it. I did not look to see if the radiator cap was on when I examined the fan. I do not know if new parts of the fan were put in on the old bearings, as I have nothing to do with that end of the mechanical work. Naturally when I saw Gilbert after the accident the blood was dripping from his hand. It was probably a minute or a minute and a half after Gilbert was injured that I first saw him. I am a machinist.

Q. Can you tell us on this Exhibit 3 how many different edges there are to the breaks in the vanes?

Mr. GARLINGTON: If the Court please, we object to this as improper cross-examination. We did not go into all of the details and the condition.

The COURT: You examined him with reference to this fan.

Mr. GARLINGTON: We examined him with reference to what he saw immediately after the accident.

The COURT: And he referred to the fan and also to [148] the radiator, did he not?

Mr. GARLINGTON: Yes.

The COURT: The objection is overruled.

A. I would say there is two.

The WITNESS: I would say that the break in this vane into which Exhibit 1 apparently fits is a

(Testimony of Carl ZurMuehlen.)

new break. When I saw this fan after the accident it was, of course, encased, and while I noticed there were a number of broken vanes, I did not count them. I tried to turn the fan but it would not turn. I could not tell you if this new break into which Exhibit 1 seems to fit was present at that time or not. All I can say is that this break has been made since the other breaks occurred. This fresh break may have been made ten days or six months after the other breaks. I could not say how long after it was made. I did not assist in making an inspection of the truck. I looked at the fan just for my own satisfaction. I cannot tell you why it is that I noticed and remember about the fuzz on the cross member of Exhibit 2 but do not recall if this fresh break was in the fan at that time. Gilbert had on a cheap ring of some sort. There was blood on it, and that is the reason I cannot describe it in detail. His finger was badly lacerated and looked as though it had been pulled. No one told me to say that. I have had about twenty years experience in first aid work.

Q. Did you use any Mercurochrome or any disinfectant or antiseptic on the wound?

A. We have orders from the doctor, in our instructions——

Q. Answer my question.

A. No, sir, I did not.

Q. You simply wrapped it up?

A. Yes, sir. [149]

(Testimony of Carl Zur Muehlen.)

The COURT: The witness has a right to explain the answer, if he wishes to.

The WITNESS: We have instructions where we take first aid that where we send a patient immediately to the doctor we are not to touch or put anything on the wound.

The WITNESS: I did not accompany Mr. Gilbert to the doctor. Mr. Jones went with him. I find on measuring that the distance between the point where I saw a mark on Exhibit 2 and the vane of the fane as it revolved is three quarters of an inch. The diameter of Exhibit 3 is seventeen and three quarter inches, and the diameter of the opening in Exhibit 2 through which the fan is visible is fourteen and a half inches, so one and five eighths inches of the fan would be back of this shell surrounding the opening in Exhibit 2. The length of the notch marked on Exhibit 3 in red pencil as AX is an inch and one eighth.

ALBERT SCHURMAN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is Albert Schurman, and I reside at Missoula, Montana. At the present time I am employed as a B. & B. carpenter for the Milwaukee Railroad, and I was employed by Mr. E. A. McLeod. I have had about ten years ex-

(Testimony of Albert Schurman.)

perience as an automobile mechanic, although I was not continuously employed as an automobile mechanic during that period. In Iowa I worked in a garage for a little over a year, and since I have come here I work on cars each winter during the layoff for different people. During the summers I work in the bridge crew for the Milwaukee Railroad, but I am not employed by the railroad in the winter. [150] I have driven automobiles since I was twelve years old, and I am now thirty-four years of age. I drove trucks back east for about a year, and I have had occasion to drive trucks since I have been employed by the Milwaukee Railroad. Immediately following the fire at the Milwaukee shops in Deer Lodge I was employed there as the driver of a Mack truck, the one involved in this case. I was working under Mr. E. A. McLeod, the gentleman who has testified in this case. This truck was delivered at the power-house in the morning and Mr. McLeod asked me to drive it. I operated the truck there for about three days. After I made the first trip with the truck I made an inspection of it, because the motor was getting warm and I looked at the fan belt to see whether it was slipping. I also inspected the fan and looked over such other parts of the motor as I could without taking the motor down. From my inspection I found that the fan assembly of the truck was in good order. I examined the fan for wobble and found just a very slight end-play. By that I mean the fan would

(Testimony of Albert Schurman.)

move slightly from one end of the shaft to the other. I would judge the end-play was about one eighth of an inch. I also looked at the magneto and the wiring and found them o. k. I did not find anything defective or dangerous about the truck, and I continued to drive it for the three days. The motor would heat up and the radiator leaked, and I had quite a time starting the motor when I would first start the truck mornings. Once in a while I had trouble with the motor missing. This would be after the motor had been idling for some time, and then when you would step on it the motor would miss. Then I would step on the gas and leave it there a minute, and the truck would start right off. The priming cups, which are for the purpose of priming the motor on a cold day so it will start easier, were all plugged up. The [151] truck also has a choke on it the same as any other car. When a priming cup is left open with the motor running it makes a hissing noise and it tends to cut down the power on that cylinder.

Q. I will ask you what your duty was with reference to reporting any defects or dangers that you might have discovered by your inspection?

A. Well, we have a book of rules, and there is rules in there governing that work.

Q. What are you supposed to do?

Mr. DAVIS: The book itself is the best evidence: and unless this plaintiff had some knowledge of what the rules were, I do not see how it would apply to him in any sense.

(Testimony of Albert Schurman.)

The COURT: Would you be able to show that the plaintiff had any knowledge that there were such rules in force?

Mr. GARLINGTON: No, sir; that is not our purpose.

The COURT: What is the purpose?

Mr. GARLINGTON: The purpose is to show the circumstances and the conditions under which this truck was received by the Milwaukee road and operated by it during the period when it is alleged that the defendant was negligent in failing to inspect it and take care of it properly. In connection with the proof of notice to it of the particular defect which is relied upon, we deem it important and material to show all of the circumstances which were present.

The COURT: A rule is not a circumstance. The objection is sustained.

Mr. MURPHY: I have prepared an offer of proof.

"OFFER OF PROOF

"Defendant offers to prove by defendant's witness Schurman [152] that the defendant operated under certain promulgated safety rules for its employees, and that at the time the truck was received by the defendant from the city of Deer Lodge one of said rules provided:

" 'Don't use tools, appliances or machinery, unless they are in a safe condition

(Testimony of Albert Schurman.)

for the work intended, and unless you are familiar with their use.'

"That when Albert Schurman was assigned to operate said truck one of the conditions of his employment and one of the circumstances under which said truck was operated was that any unsafe condition of the truck for the work intended should result in his ceasing to use it and reporting it to his superiors."

Mr. MAURY: We object to this as not material, not relevant as proving or tending to prove anything in this case, as a self-serving declaration, and as not having been brought home to the plaintiff in any way by notice or knowledge.

The COURT: In view of counsel's statement that the rule was not brought to the attention of the plaintiff in this case, and the further fact that he was only in the employ of the defendant corporation, as shown by the testimony of the defendant, for a period of two and a half days, the objection is sustained. Mr. Murphy, I will ask if you have any authorities?

Mr. MURPHY: No, your Honor, I have not; and I want to say frankly that I have no firm opinion that the plaintiff in this case could be bound by a rule of which he had no knowledge if his failure to have knowledge was due to any omission of the railroad company in not calling it to his attention. However, purely as a matter of precau-

[153] tion, we desire to introduce the rules. I think

(Testimony of Albert Schurman.)

this proof is competent upon the question of the negligence of the defendant as to what its system was with reference to defective apparatus, tools, or appliances.

The COURT: The objection is sustained. Proceed.

The WITNESS: My inspection of the motor and fan of the truck was as complete as could be made without taking the motor down. In my ten years' experience as an automobile mechanic I have never heard of a fan exploding from centrifugal force. I am familiar with the operation of Mack trucks. They are a low speed truck and they have no governor on them. For a fan of the size and weight of Exhibit 3, before it was damaged, to explode from centrifugal force it would have to be revolving at a very high speed. The speed at which the fan rotated in this Mack truck would not be sufficient to cause it to explode from centrifugal force. My opinion is that some obstruction to the fan while it was in operation caused it to break. About three weeks after the accident, and when I returned to Deer Lodge, I had occasion to again drive this truck. I inspected the truck at that time and found the blades of the fan broken. I did not make a careful examination, but just sufficient to see if the truck was safe to run. There was no wobble in the fan at that time, and there was no more end-play than was present when I had driven the truck previously.

(Testimony of Albert Schurman.)

Cross-Examination by Mr. Davis:

The WITNESS: I am quite familiar with Mack trucks. I have driven several different ones, but I could not say exactly how many. I drove a truck in Iowa, during part of which time I was working for the state. In Iowa I drove both a Mack truck and an International truck. Then I drove the Mack truck involved in [154] this case. Since then I have not driven any truck. I examined this truck when I first drove it and found it to be o. k. I found that the radiator leaked and that the engine missed. I found an end-play in the fan of about one eighth of an inch. I did not measure this. The end-play could have been less than an eighth of an inch, but it could not have been more than that. This fan belt, Exhibit 9, looks like the same fan belt that was on the truck. I noticed where the belt had been pieced and riveted. I also noticed where the edges of the belt had become worn. They all do that. I still want the jury to think that the truck was o k. There was nothing wrong with it, and it ran all right. I would say that this truck is about a 1915 model and that it is at least twenty years old. I had trouble starting this truck in the mornings, and I usually got the other truck to drag it around a little ways. We used to pull it from the power-house to the end of the roundhouse, a distance, I would judge, of about a half a block. One day I had to drag it further than that in order to start it. On that day we first pulled it up on the

(Testimony of Albert Schurman.)

hill and then pulled it down. However, it was not in gear when it was pulled up the hill. The distance the truck was pulled down the hill was about a block, and then it started. I tried to crank the truck on a cold morning, but you could not start it that way. The priming cups were plugged up and I cleaned them out. When we would drive the truck around it would boil. I did not know the radiator was filled with an anti-freeze solution. I just kept putting water in the radiator, and I used to fill it about every trip. The round-trip would be, I should judge, about two blocks and a half. However, the motor was never shut off, but was running all the time. The truck did not have a tendency to jerk, because I would not start the pull until the engine [155] started to work properly. I would hold it open a few minutes and until it started hitting on all four cylinders. I did not take the fan or any part of the engine apart when I inspected the truck, nor did I inspect the fan belt by taking it off. I did not take apart Exhibit 3 to see if any of the vanes had been broken. When I first drove the truck I did not notice if any of those vanes were broken. When I drove the truck three weeks later the fan, so far as I know, was in exactly the same condition that it is now.

Q. You still think the fan is o. k.?

A. It wasn't really o. k., but I watched it. I kept my eye on it all the time so——

Q. So you wouldn't have your hands cut off?

A. Yes.

(Testimony of Albert Schurman.)

The WITNESS: I was not present when the new parts for the fan arrived. I stated that in order for the fan to explode it would have to be revolving at a high rate of speed, and I gave it as my opinion that the breaking of the fan was caused from some obstruction. I believe it would be possible for the ring finger of an ordinary man's hand to obstruct this fan sufficiently to cause it to break in the manner it appears to be broken, because if one or two vanes were broken out the pieces would fall to the bottom and cause others to break; and I believe that a boy's hand would be a sufficient obstruction to break the vanes of this fan, the vanes being three eighths of an inch in thickness and constructed of cast aluminum. The only way in which I can figure this fan was broken is as the result of some obstruction. I have never seen a fan explode. I have seen them when they had broken, and usually with the result that they went through the radiator. I heard the testimony of Mr. Stubbs to the effect that [156] a fan had disintegrated and that a piece of it had been thrown through the hood of the car for a distance of fifty feet. This might have happened, I believe, with a steel fan. If a fan weighing twenty pounds attained a speed of one thousand revolutions a minute, it would have quite a little force. Going at a speed such as that I think it possible that an obstruction of the fan by the ring finger of a boy would be sufficient to break the fan. I would say

(Testimony of Albert Schurman.)

that the vane marked a-4 is the vane that broke first. I think aluminum such as this is easy to break. I used to be in the junk business and I have broken lots of it.

Q. Let me see you break this piece with these two pliers (counsel handing to the witness the piece Exhibit 1 and two pliers).

Mr. MURPHY: If the Court please, we object to the demonstration for the reason that it is not to be made under the circumstances counsel has inquired about, it in one case being a revolving fan and in the other a piece of metal three by four inches, or something of that size; and it would not demonstrate, I am sure, whether a revolving fan would break or whether it would not, but seems to me to be entirely non-probative of what might develop under the conditions so far developed in this case. I object to it as being of no probative value in this case and as being entirely immaterial.

The COURT: I do not like to have the exhibit broken, but I will overrule the objection.

A. This would be different than the pressure of that. I will tell you why: that is travelling and this is standing still.

(The witness thereupon broke into two pieces Exhibit 1.) [157]

The WITNESS: I did not say that this boy's finger was the cause of this breaking of the fan. I said it was some obstruction.

(Testimony of Albert Schurman.)

The COURT: Before we proceed any further I should like to have the reporter mark that portion of Exhibit 1 that has been broken from it.

(The piece broken from Exhibit 1 was marked by the reporter as Exhibit 1-A.)

The WITNESS: I am six feet and one inch tall, and I weigh about 173 pounds.

S. W. HULBEN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is S. W. Hulben, and I reside at Deer Lodge, Montana, where I have been employed for approximately twenty-two years as a machinist for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I am doing general machinist work, which involves the repairing of various mechanical devices. I am familiar with Exhibits 2 and 3. I first saw them about thirty days after the accident, at which time Exhibit 2 was in its proper position on the truck and Exhibit 3 was in its proper position inside of Exhibit 2. My reason for seeing these exhibits at that time was that I had been assigned by my foreman, Mr. Jones, to remove the broken fan and apply the new one which the company then had. This installation was made by me, and the fan which is now

(Testimony of S. W. Hulben.)

a part of Exhibit 2 is the new fan which I installed. In removing the old, broken fan, Exhibit 3, and in applying the new fan I found that the bushing or outside race that was then in [158] the new fan was different from the kind that would be needed in there in order to apply it. I examined Exhibit 3 before it was removed from Exhibit 2, because a mechanic will naturally want to know if anything is going to be needed for the correcting of the bearings and one thing or another, and before taking out a thing of that nature you will check it over to see if it needs any corrections. I examined Exhibit 3 in place for wobble, but I found none, or at least not enough to cause any correction to be made, as the fan rotated freely and perfectly on its axis, to my knowledge. There was no excessive end-play; that is, there was not sufficient end-play to warrant correcting that condition. There has to be some end-play, for otherwise the fan would not rotate. If the fan were tight it could not rotate, or if it did rotate it would run hot. One sixteenth of an inch would not be an excessive end-play and would permit the fan to run all right. In the fan as assembled and that I removed were the cast aluminum piece to which are attached the vanes, and inside the fan the sleeve or race which is a pressed-in, tempered steel piece, and in that the ball-bearings which rotate on an axle which in this case was a bolt. This axle is sustained by the cross members on Exhibit 2, the axle rotating

(Testimony of S. W. Hulben.)

on the center cross member, the axle on this side protruding approximately an inch from the center of the cross members. It protrudes in a similar manner on the other side, the only difference being that on this side there is a grease-cup through which to inject lubrication into the fan. When the radiator and fan are in place on the truck, this part of Exhibit 2 which is covered with a mesh faces toward the driver and is just ahead of his knees or feet. The axle of this fan is a piece of steel, threaded on one end for a nut, and it has shoulders on the inside to take care of the ball-bearings. [159] There is also a shoulder on the outside that comes up against these cross members on this side, and you have a head that comes up against the cross members on the other side, which makes that really a stationary part of the body of the fan. When I examined the axle of the fan it was, in my opinion, in good condition and showed no wear at all. If there is any wear it can be detected by turning the fan over. I also examined the ball-bearings of the fan and found them to be in first-class condition, there being no flat spots or anything defective about them. These ball-bearings are in there to take care of the play and the lateral, and they govern the fan as to wobble. A wobble could be present because of the fan being out of balance or because of worn bearings. Those are the main causes that I can now think of. The race or sleeve in the old fan was just as good as new.

(Testimony of S. W. Hulben.)

I reassembled the fan and installed it as it is now in Exhibit 2. The parts that were in the old fan, Exhibit 3, were pressed out and put in this new fan that is now in Exhibit 2; and, these parts are now in the new fan exactly the same as they were in the old fan. So, inasmuch as there has been no change in the bearings, the end-play in the new fan is exactly the same as it was in the old fan, and any wobble that might be present in the new fan is exactly the same as it was in the old fan. The end-play now present in the new fan is not excessive. The new fan as now installed as a part of Exhibit 2 has nothing wrong with it, and in my opinion there is nothing about the assembly of that fan that is defective or dangerous. The conditions in reference to end-play and wobbling now present in the new fan are identical with the conditions present in the old fan at the time I was assigned to take the old fan out and before it was removed. I was asked to make some measurements on the Mack [160] truck. I made these measurements and I have the figures with me. This picture, Exhibit 7, is a correct picture of the truck. The height of the left fender above the ground is forty-two and one half inches. The distance from the extended plane of the outside edge of the left fender directly horizontally to the fourth pet-cock on the motor is thirty-eight inches. The height of the pet-cock from the ground is four feet and eight inches. The fresh break on the vane of Exhibit 3 which is marked with red

(Testimony of S. W. Hulben.)

pencil and which is further marked a-7 was not present at the time I removed Exhibit 3. This piece has apparently been taken out since then.

Cross-Examination by Mr. Maury:

The WITNESS: I did not say that Exhibit 3 has been much broken since it was taken out of the truck. I stated that one piece was probably broken out since. When I removed Exhibit 3 I turned it over to Mr. Jones, my foreman, who carried it away. At the time I turned it over to him this piece that was broken out of the vane marked with red pencil was not broken out. The fan was never used again after it was removed. I have no way of knowing how this piece was later broken from the fan. I am sure the fan is now in a changed condition from what it was when it was removed. That is the only piece that is out now that was not out of the fan when it was removed. I see no difference in the discoloration of these other breaks. Some of them may have a little stronger discoloration than others, but they appear to me to be the same. This vane which is completely gone from Exhibit 3 was missing when I removed the fan, as was the one next to it that is nearly completely gone. I had nothing to do with the removing of the rim. In clearing the fan so it could be used again, the rim was removed by somebody, and it was not in [161] place when I removed the fan. It was removed, I would say, a few days after the accident and before the truck was again

(Testimony of S. W. Hulben.)

used. When the truck was used after the accident Exhibit 3 was in the truck, and, except for the jagged chunk marked a-7 that is now out of one of the vanes of Exhibit 3, the fan was in the same condition that it now is. The truck was used with the fan in that condition for a few days, but I could not state for just how many. I did not find any pieces of the fan in the bottom of the housing, as somebody had removed them all before I was assigned to the work of removing the fan. I installed only one new part, and that was the fan itself. I did all the work of removing the old fan and installing the new one. No one else did any of this work. The sleeve that was in the old fan was placed in the new fan, and the sleeve that came from the factory with the new fan was not used. Exhibit 10 is the sleeve that came with the new fan and that was not used. The fan is the same size as the old fan, but the parts in connection with the race were not interchangeable. The old sleeve is the same size as the new sleeve so far as the outside circumference is concerned. The inside is different. This sleeve is a press-in fit and will not fall into place, but you can see it will fit in place if you drive it in with a hammer, using a piece of brass so as not to mar the end.

Mr. MAURY: I will offer this sleeve in evidence.

Mr. MURPHY: We have no objection.

The COURT: The exhibit is admitted in evidence without objection.

(The sleeve was received in evidence as Plaintiff's Exhibit 10.)

(Testimony of S. W. Hulben.)

The WITNESS: The fan and this sleeve were the only new parts [162] received. That is why it was necessary for us to use the old bearings in installing the new fan. In changing the fan it was necessary to take out the sleeve of the old fan, and, after removing the bushing that was in the new fan, placing the old bushing in the new fan. A bushing is a hollow member which acts as a bearing on which something rotates. In removing the bushing from the old fan I used a press that is in the shop and that is made for that kind of work, and in which water causes a piston to come down and remove the bushing. The shaft is this center feature, and it was removed by taking off the nut and pulling the shaft out. That is loose, and it was not necessary to use the press in removing it. We did not have a new assembly, but simply placed the new fan in there with the old assembly. I do not know whether a new assembly would fit or not, because I never saw it. I never at any time saw any part of the other rim that went around this fan, Exhibit 3, and I do not know where it went to, as I was not around when it was removed.

JAMES O'NEILL,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is James O'Neill, and I reside at Butte, Montana, where I am employed

(Testimony of James O'Neill.)

as shop foreman for the C. & F. Teaming and Trucking Company. I am a mechanic and have been such for twenty years. In my present employment I have to do with the repair and upkeep of trucks, and the work is all on heavy trucks; and, in this connection, I have under my care, for repair and upkeep, Mack trucks. In other occupations I have also had considerable to do with Mack trucks. I recognize the type of fan [163] that Exhibit 3 is. It is the type fan used in the AC Mack truck, better known as a "Bulldog Mack." I am generally familiar with that type of Mack truck. I have looked at Exhibits 2 and 3 in Helena prior to coming into court and within the last two or three days. This type of Mack truck is an old model, and I had 350 of those trucks under my charge at Coblenz, Germany, during the World War. I had full charge of this fleet of trucks and of their upkeep and repair. Exhibit 3 is a fan and is the type of fan used in the old type of Mack truck, but not in the late type. In a fan of this type which is not damaged there should be a ring or band which encircles and joins the tips or outer ends of the vanes, such as the band that is now on one side of this fan, encircling the tips of the vanes on each side of the fan. The fan which is now in Exhibit 2 has such a circular band on both sides of the fan. The engine in the Bulldog type Mack truck will turn over at six hundred revolutions a minute at a governor speed of fourteen miles an hour, at which speed the governor is set at the factory. If

(Testimony of James O'Neill.)

set properly, the idling speed of the motor is between 150 and 200 revolutions a minute. What the number of revolutions a minute would be at a medium speed would depend upon what was considered a medium speed, and they would be somewhere between 150 and 200 revolutions a minute and 600 revolutions a minute. The fan would revolve to the right as you look at it from the front of the truck, or clockwise. In order for the pieces to be broken out of the fan Exhibit 3, I would say that the fan would have had to strike something. I am familiar with centrifugal force. It is the force at which an object is rotating or spinning. A part of a wheel or fan that was spinning could let go and fly. However, with this type of fan, and assuming that the engine was revolving at a [164] speed of something less than six hundred revolutions a minute, I do not see how this fan could fly apart; and, in my opinion, the centrifugal force exerted by such a fan at that speed could not take out those pieces. Exhibit 3 is constructed of a composition of aluminum. If the centrifugal force were sufficient to cause a fan revolving in a housing such as Exhibit 3 was in to fly apart and cause numerous pieces to come out of it, it is my opinion that part of the fan thrown by centrifugal force would come through the coils of the radiator. I am acquainted with the location of the motor and of the pet-cocks on this type of truck, and the relative positions of the fan and radiator and motor when assembled

(Testimony of James O'Neill.)

and in place. The radiator is to the back of the motor and is between the motor and the driver. The photograph marked Exhibit 5 shows the location of the pet-cocks and particularly of the pet-cock nearest the radiator, and their position as shown by the photograph corresponds with my knowledge of their location in this type of truck. The pet-cock on the cylinder nearest to the radiator is approximately in line with the shaft or axle supporting the fan. Assuming that the driver of a truck of this type is making an adjustment by opening or closing the pet-cock nearest the radiator, and that the fan which is revolving in the radiator shell becomes broken and pieces are thrown as they would be by centrifugal force, and keeping in mind the location of the motor and its parts, it is my opinion that a part of the fan could not be thrown out between the cross members on the radiator shell and strike the fingers of the driver of the truck who had his thumb and first and second fingers on the pet-cock. Of course, nothing is impossible, but it does not seem likely that this could happen. I made an examination of the horizontal cross member on Exhibit 2 and observed that the [165] cross member is cracked. Standing at the front of the truck and looking back over the motor, this crack would be to the right-hand side. It is right here (indicating a point on Exhibit 2).

Q. Now, Mr. O'Neill, it appears in evidence here that the driver of this truck on a certain day nearly

(Testimony of James O'Neill.)

two years ago was manipulating or handling in some fashion the number four petcock. His testimony discloses that on the third finger of his right hand, or the one nearest to the little finger, he had a ring of metal. Without assuming as to what actually happened, let me ask you, if this finger with the ring became lodged in between the cross member at about the point where you observe the crack and the blade of the fan, whether or not, in your opinion, such a happening would or would not cause the breaking out of these pieces of the vanes to which I called your attention earlier?

Mr. DAVIS: To which we object on the ground and for the reason that it is calling for the conclusion of the witness, and no proper foundation has been laid. It has not been shown whether it is a soft ring or a hard ring, or what kind of metal it is, and it is purely speculative on the part of Mr. O'Neill.

The COURT: Is there any testimony showing of what metal the ring was made?

Mr. MURPHY: Nothing except that it was a metal ring.

Examination by the Court:

Q. Would it make any difference, Mr. O'Neill?

A. No, it wouldn't. Metal is metal, your Honor, as I see it.

Q. The resistance would not make any difference in the situation?

A. Not unless it was something like solder or pewter. If it [166] was pewter, of course, it would make a difference.

(Testimony of James O'Neill.)

The COURT: I do not think there is anything in the record showing what the composition of the ring was.

Mr. MURPHY: As I recall, plaintiff's evidence was that it was a metal ring, but neither gold nor silver.

The COURT: Yes. And in view of the statement of the witness that the answer would have to depend somewhat upon the composition of the ring, I will have to sustain the objection at this time. You can call the plaintiff and find out of what it was made.

Mr. MAURY: We will withdraw our objection.

A. Well, in my opinion, anything rotating hitting metal that is hard enough, it will break it with very little force. That is the experience I have had.

Direct Examination by Mr. Murphy (Continued):

The WITNESS: If those blades were rotating and came in contact with a ring enclosing a man's finger, which ring was of a composition sufficiently hard, the blades would be broken. Aluminum is more readily broken than iron or steel.

Cross-Examination by Mr. Maury:

The WITNESS: The motor at maximum speed revolves six hundred revolutions a minute. The fan is stepped up from the motor and revolves possibly a quarter again as fast, or probably eight hundred revolutions a minute. That is approximate. I do not know whether there was a governor on that fan

(Testimony of James O'Neill.)

or anything about the truck, as I never saw it. Neither do I know if it is one of the 350 trucks that I had in my charge in Germany. I stated that this type of truck had a governed speed of fourteen miles an hour. I could not state positively the number of revolutions a minute the fan would be going at that speed. I stated about eight hun-[167]dred, but that is just a guess on my part. I have taken the motor speed on that type of truck, and there is a way of figuring the speed of the fan, but I have never figured that. I just stated eight hundred revolutions as being roughly a quarter more than six hundred. One hundred and fifty would be exactly a quarter more. I do not know if this particular truck had a governor on it, but even without a governor the motor could not develop a speed of over eight or nine hundred revolutions a minute. The faster your motor goes the faster the fan revolves. When I speak of a speed of fourteen miles an hour, I am speaking of the speed of the truck and not of the fan. With the motor going nine hundred revolutions a minute, the fan would be going probably a thousand or a thousand and fifty revolutions a minute. I have not the ability to figure how many miles at that speed the outside perimeter of the fan would be travelling an hour. The outside diameter of the fan, I find on measuring it, is seventeen and a quarter inches, or perhaps if it were right down flat it might measure seventeen and three eighths.

(Testimony of James O'Neill.)

Multiplying the diameter by 3.14159 to find the circumference, the result, as close as one needs to figure, is fifty-four inches, or four and one half feet, which, multiplied by eight hundred revolutions a minute, would be 3,600 feet a minute. If that would be fifty-one or fifty-two miles an hour that the perimeter of the fan was travelling, it would make a difference in my calculations and in my opinion. If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. The fingers are softer than the metal in this fan. If the fingers got into the fan something would have to happen, but whether it would take the fingers off or not [168] I do not know. I have never known of this particular type of fan flying apart. I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of crystallization takes place in aluminum, although there is some.

Q. Calling your attention to Exhibit 1, don't you, Mr. O'Neill, see evidences of crystallization in that?

Mr. MURPHY: That is objected to for the reason that the piece is introduced in evidence as being one that has broken off from the fan which has been subjected to the force of the blow or whatever

(Testimony of James O'Neill.)

it was that broke it; and, therefore, whether crystallization is now present is of no pertinency, and we object to it for that reason.

The COURT: The objection is overruled.

A. Well, Mr. Maury, that particular thing looks to me as though something had rubbed by it.

The WITNESS: Down in the little cavity in that same piece that may be crystallization that is present and it may not.

Redirect Examination by Mr. Murphy:

The WITNESS: On this particular type of Mack truck the cooling system was never correct, and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vanes of the fan tends to strengthen the fan.

GEORGE SHUE,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy: [169]

The WITNESS: My name is George Shue, and I reside at Butte, Montana. I am assistant professor of physics at the Montana School of mines and the acting head of the department. I have received a scientific education and training, and I have received degrees indicating that fact. I hold the de-

(Testimony of George Shue.)

gree of chemical engineer and the degree of master of science, with a major in metallurgy. On September 10, 1935, I completed at the University of Southern California all my work for a doctor's degree. This degree has not yet been received.

Q. Have you any information as to whether or not that degree has been conferred?

Mr. MAURY: We will admit that he is now a doctor.

The WITNESS: I have had several courses in metallurgy, two in particular of which were in metallography, one being a lecture course three times a week, and the other being a laboratory course six hours a week. These studies are designed particularly to give one a knowledge of the composition and action of metals. Some days ago, at your request, I looked at a Mack truck, and I particularly examined the fan installed in the truck and the fan which has since been introduced in evidence in this case as Exhibit 3. I also examined Exhibits 2 and 3 again yesterday here in the courtroom. I have also been in court during the giving of the testimony in this case. It appears that the break on Exhibit 3, which is marked by a red pencil mark, was made since the other breaks on Exhibit 3 were made.

Q. Now, it appears in evidence here that Exhibit 3, which you have just looked at, was used after the 30th day of October, 1933, on which day

(Testimony of George Shue.)

it was damaged and pieces broken out of it, at least three days or maybe more, and in that use performed the function of a fan in this Exhibit 2 and the truck to which it [170] was attached. Having that in mind and again directing your attention to the break which you have designated as a fresh break and which is marked with red pencil, would you say that that break was present in that piece of metal and exposed during the time the truck was used?

Mr. DAVIS: To which we object on the ground that no proper foundation has been laid. It calls for the speculation of this witness. There is no evidence whether he saw the truck before or whether he saw it afterwards within a day or two, and it calls for a pure opinion as to whether or not he thought the thing would be different than it is if it were used.

The COURT: Everything he has testified to is a matter of opinion.

Mr. DAVIS: We make the further objection that it invades the province of the jury.

Examination by the Court:

Q. Have you made any special study, Doctor, that would qualify you to answer that question? In other words, have you observed in actual operation the use of such a truck?

A. No, I don't believe I have.

The COURT: The objection is sustained.

(Testimony of George Shue.)

Direct Examination by Mr. Murphy (Continued):

The WITNESS: I am familiar with the metal of which Exhibit 3 is composed. That is an alloy cast aluminum, which consists almost entirely of aluminum. There are a few other materials in it. The vanes in Exhibit 3 appear to be approximately three sixteenths of an inch in thickness. Aluminum is much softer and much more brittle than steel.

Q. Do you know the number of revolutions a minute such metal [171] would stand before breaking or flying off by centrifugal force?

Mr. MAURY: We object to that as being impossible for any person to answer, as it would depend on the radius, and without the radius being given, no one could answer it.

The COURT: In the present form the question is objectionable, and the objection is sustained.

The WITNESS: The tensile strength of the metal of which Exhibit 3 is composed would probably be greater than ten thousand pounds to the square inch.

Q. Could you reduce that in any proper scientific manner to the revolutions a minute which Exhibit 3 would stand; that is, that the metal in Exhibit 3 would stand?

The COURT: Is that a matter of metallurgy.

The WITNESS: It is a matter of physics.

A. You mean this fan since it has been broken?

Q. No; in its whole condition. I do not mean that particular fan, but that type of fan.

(Testimony of George Shue.)

A. Well, a fan of that type would probably stand rotating at a speed in excess of twelve thousand revolutions a minute before there would be danger of its flying apart.

Q. From centrifugal force?

A. From centrifugal force.

The WITNESS: As between a sharp or sudden pressure exerted against a piece of metal and a slow, continuing and increasing pressure, that force depends upon the suddenness or quickness with which the object it strikes is stopped. The quicker you stop an object the greater the force exerted.

Q. Directing your attention to Exhibit 3 and particularly to those vanes which have lost portions near the top or front as I [172] hold it towards you, of a somewhat general semicircular nature, I will ask you to state whether those pieces could be broken out of this fan when revolving by striking some obstruction, which striking would be near the front of the fan as you look at it.

A. I think that is the way they were broken out.

Q. Well, will you answer my question?

Mr. DAVIS: We will ask that the answer be stricken out as not responsive.

The COURT: The motion is denied.

A. They could.

The WITNESS: Assuming that the plaintiff in this case, on the 30th day of October, 1933, was manipulating or adjusting a pet-cock which is

(Testimony of George Shue.)

known as the number four pet-cock on the rear cylinder or the cylinder nearest to the fan on the truck that he was driving, and that on his hand he wore a metal ring and a glove, and that the ring finger, which was the third finger of the hand, got in between the cross member and the path of the fan, and that the blades of the fan and particularly the ones to which my attention has been directed may have struck the finger and the ring, I believe those breaks in Exhibit 3 to which you have just called my attention could have resulted therefrom. From an examination of Exhibit 3 I am able to state the order in which the breaks in this fan occurred. Thinking of this fan first as an unbroken fan with a ring to the front of it such as the ring at the back, if while the fan were rotating some foreign object were thrust in between the cross member and these vanes, this foreign object would cause these breaks, because the ring out here would still tend to support these vanes and not let them break away back. Four of them show that type of break, and it would appear that they were all broken in that manner. [173] It would be purely speculative as to how the rest of them were broken, because with these pieces freed the others may have been broken by binding on these pieces somewhere within the radiator. This fan was rotating clockwise, and the order of the breaks to which I have referred, using the markings now upon the vanes, is as follows: a-4, a-3, a-2, and

(Testimony of George Shue.)

a-1. It is my opinion that the pieces broken out from the vanes and designated as a-4, a-3, a-2, and a-1, in that form and shape, could not be thrown out of the vanes by centrifugal force. Assuming as correct the evidence that the motor of this truck when up to full speed would make nine or ten hundred revolutions a minute, and that the fan connected to the motor was stepped up so that it would revolve one fourth or one third more times a minute than the motor, it is my opinion that such a speed could not cause this fan to fly apart by centrifugal force.

(At five o'clock p. m., Friday, September 28, 1935, a recess was taken until the following Monday morning, September 30, 1935, at ten o'clock a. m.)

Cross-Examination by Mr. Davis:

The WITNESS: I stated on direct examination that this aluminum fan would stand a resistance to centrifugal force to an extent of at least twelve thousand revolutions a minute, and possibly more. How much more it would stand is rather difficult to say, because we cannot tell exactly the strength of a material, and those calculations are based on the minimum observed tensile strength of cast aluminum. This is based on a tensile strength of ten thousand pounds to the square inch, or approximately that. The formula, of course, was not worked out for a fan of exactly those dimensions and of that shape, but the formula is worked on a basis of a

(Testimony of George Shue.)

thing which is approximately the same dimensions and [174] of perhaps a little simpler shape, and it also did not involve these outside rings. Those rings would probably tend to make it a little stronger than where the vanes were sticking out with no support at their ends. The formula used is a very common one for circular motion and for computing the force acting on a body moving in a circle; and this was merely applied in computing the force that would be exerted on one of those vanes to tear it out of the piece. The basic formula is a mathematical formula for the expression of Newton's Laws of Motion. It was stated by Newton during the seventeenth century. The data which I used for ascertaining the tensile strength of aluminum were in a handbook which was published about five years ago. Of course, those data were taken at some previous time, the exact date of which I do not know. It was about 1907 that aluminum was first commercially produced, as prior to that time the cost of producing metallic aluminum was excessive because of the fact that the cost of extracting it from its ores was excessive. The processes of alloying aluminum today are different than they were twenty years ago, the processes then not being as good as they are today. As to the effect of the annealing process on cast aluminum, when the material is cast it does not cool equally and the result of that is to set up internal strains within the cast because of this unequal cooling with its resulting unequal con-

(Testimony of George Shue.)

tract of the parts, and this annealing relieves those strains and makes the piece more uniform. The annealing of duralumin is done in some kind of a furnace, and is always accomplished in a much shorter time than two or three years. It is a matter of only hours or days. If aluminum is properly annealed it is better after the annealing than before.

Q. Supposing aluminum were subjected to a heat of say 350 [175] degrees centigrade, what would happen to it?

A. I have forgotten the melting point of aluminum, but I think it is considerably in excess of that, so such a temperature might be the proper annealing temperature for certain elements.

Q. Don't you know as a matter of fact, Doctor, that a heat of 350 degrees centigrade would practically destroy the aluminum?

A. It would some alloys.

The WITNESS: Three hundred and fifty degrees centigrade would be six hundred and fifty degrees Fahrenheit. The tempering heat for aluminum would not be as high as that for steel, and if aluminum were subjected to a heat as high as the tempering heat for steel it might melt the aluminum. I do not think room temperature would have much effect on aluminum. An aluminum rod would probably have two or three times the tensile strength, or perhaps more, of a hickory stick of the same size. Figuring the diameter of the fan roughly at eighteen

(Testimony of George Shue.)

inches, and if I have not made a mistake in my hurried calculations, I find that with the fan revolving at twelve thousand revolutions a minute the perimeter or circumference of the fan would be travelling at the rate of something like six hundred miles an hour. The slide-rule shows 620 miles an hour. I do not know whether that fan revolved that fast or not, but a fan of that material should stand that speed without danger of breaking.

Q. You base your calculation upon its being in perfect condition and not having been subjected to crystallization? Is that correct, Doctor?

A. What do you mean by crystallization?

Q. Please tell me what crystallization is.

A. Well, crystallization is an orderly arrangement of the [176] molecules of the material. In the case of metals they are crystalline, the molecules orderly arranged in crystal groups; and all metals are crystallized.

The WITNESS: It is possible for one of the crystals or molecules to sort of absorb others or cause them to grow into a solid mass. That takes place. I do not know as I know the exact cause of that, but vibration or shaking might have something to do with it, or heating it to perhaps 350 degrees centigrade might cause it. I think the fastest automobile has travelled about three hundred miles an hour. I think the fastest aeroplane has travelled at about the same speed, except that perhaps it has

(Testimony of George Shue.)

travelled up to four hundred miles an hour or a little more for a short time. The wings of aeroplanes sometimes come off. Most aeroplane wings are built of aluminum or like metal alloys. The application of too much force, in my opinion, would cause those aluminum alloy wings to break off. That force might be centrifugal force. I believe the frame structure of dirigible balloons is of aluminum or other like metal alloys. I have heard of them breaking, and that would also come from the application of too much force at some point. However, in that case I do not think the force could be centrifugal force. I never heard of a dirigible travelling three hundred miles an hour. I have heard of the old-fashioned grindstone flying apart, and this was probably due to centrifugal force. I believe, too, that circular steel saws have been known to fly apart, and the cause of that would, in my opinion, be centrifugal force. Circular saws are made of steel. Structural steel has a tensile strength of something like fifty or sixty thousand pounds to the square inch, or, in other words, it has five or six times the tensile strength of aluminum. Tool steel has probably from five to fifteen times the tensile [177] strength of aluminum. I do not remember of the incident when one morning your father and five other men were on a cage at the West Colusa Mine and the cage was dragged up to the top, and that suddenly the fly-wheel in the top of the sheave flew apart and these men were dragged into the sheave, and that one man was

(Testimony of George Shue.)

thrown out and struck against a wire and went down two thousand feet to his death, and I do not know what caused that fly-wheel to fly apart. Neither do I remember the occasion of the fly-wheel at the Moonlight Mine flying apart, when chunks of steel weighing from ten to fifteen pounds flew a city block. I have never seen a fly-wheel on an automobile fly apart, but I heard of one flying apart. The cause of that might have been centrifugal force, if it were in a weakened condition. A fan might become weakened if the vanes became bent and were straightened or if in some other manner something had happened to the fan to cause it to become weakened. I do not think the fact that the fan was within six or seven inches of the engine of the truck and that the engine had become overheated many times over a period of twenty years would have any effect on the fan. Excessive heat would weaken it, and vibrating and shaking would have its effect. If the fan were revolving at from six to eight hundred revolutions a minute and were running out of its periphery, there would be a small amount of vibration which might have a tendency to weaken the fan. If it were on an old-fashioned dead-ax. wagon which was hauling huge loads over very rough places, it might have a weakening effect on it. I recognize the following statement from the Encyclopaedia Britannica as a correct statement: "Form and Structure.—Aluminum when cast from

(Testimony of George Shue.)

the furnaces solidifies in crystal masses, as may be seen if an ingot be broken at temperatures just below the melting point. [178] Mechanical working deforms and partly shatters the original crystals, but subsequent heating causes recrystallization. When the degree of deformation and temperature of heating are suitable, some crystal grains grow at the expense of others and, under carefully selected conditions, one grain alone may grow and thus convert large pieces of metal into a single crystal. Exaggerated grain size such as this is avoided in practice, metal showing this phenomenon being defective in mechanical properties." While this particular encyclopaedia was published in 1932, I believe that conclusion had been reached prior to that time. While I do not remember the exact temperatures, I believe the following statement from the same encyclopaedia is true: "At high temperatures aluminum is very weak, whilst after being heated for a few hours to 350° C. work hardness is permanently lost." I also agree with this statement from the same work: "Aluminum ranks as a soft metal, its hardness being about one half that of copper and zinc but double that of tin." I do not know the tensile strength of the bone in the ring finger of a human being. Assuming that the fan had nine vanes and was travelling at the rate of six hundred revolutions a minute, a finger in there for that length of time would be struck nine times six hundred, or fifty-

(Testimony of George Shue.)

four hundred blows. I would have to have some information before I could say whether a human finger could have broken out the vanes of this fan, because it depends on how the blow was struck. If the conditions were right, I believe it could. I do not believe that a human finger could have caused the crack in the cross member on Exhibit 3, nor do I believe a human finger, by being caught between the fan vanes and the cross member on Exhibit 2, could have caused that crack. There is a space between the cross member and the fan vanes of [179] five eighths of an inch, and I do not believe that if a human finger had been caught in there it would have taken it off like a piece of cheese, because in that wide a space the cross member and the blades of the fan would not make a very satisfactory shears. It would have a great tendency to cause the finger to bend or break. Hoisting cables, when they lose their elasticity, sometimes pull in two. Considering that the fan is working within that radiator, where it is not subjected to very high temperatures, I do not think the fact that the fan had been operating for a period of from ten to twenty years would be a great factor in connection with the disintegration of the fan. I do not think an ordinary ten-penny nail could have made that crack on the right cross member. If the fan, travelling at six hundred revolutions a minute, had flown apart the pieces would, no doubt, fly with considerable force, and would tend to continue in a straight line in the

(Testimony of George Shue.)

direction in which they were moving at the instant they were let loose. If they should strike something it is possible that they would be ricochetted and deflected from a straight line. There are a number of places within the interior of the shell of the radiator where the tubes are bent as if they had been struck by some object. I was present in court the other day when Mr. Schurman, with the aid of two pliers and his leg, broke Exhibit 1-A away from Exhibit 1. It took some force to do that. My estimate of the dimensions of Exhibit 1 are merely an approximation, but in the hurried calculation I have made I would estimate that the probable tensile strength exerted at the point of maximum curvature in attempting to bend a thing like that would be in excess of five thousand pounds to the square inch. That would be a minimum. In other words, with the aid of two pliers and using his leg as a fulcrum, Mr. Schurman was able to [180] apply a pressure of at least five thousand pounds to the square inch. If it broke with a pressure of five thousand pounds to the square inch, then its tensile strength would be half of what it would be if it had a tensile strength of ten thousand pounds to the square inch. However, I estimated for a minimum tensile strength of five thousand pounds, and the tensile strength might still be ten thousand pounds to the square inch. It is safe to assume that if the truck was in use for twenty

(Testimony of George Shue.)

years and was subjected to vibrating and shaking and to overheating on numerous occasions that it is possible the material may have lost some of its tensile strength. When hoisting cables lose their elasticity I presume they are ranked as unsafe and are no longer used.

Redirect Examination by Mr. Murphy:

The WITNESS: I was asked to estimate the speed per mile at which a point at the perimeter of a fan of the dimensions given me by counsel would be moving under an axle speed of twelve thousand revolutions a minute, and I have stated that it would be roughly in the neighborhood of six hundred miles an hour. If the motor were at an idling speed the miles per hour at the perimeter of the fan would be reduced in direct ratio to the reduction in the speed at the axle, for, being integral, the axle speed and the speed of the perimeter, or any point between the two, must remain in direct ratio. I think the excerpts read to me by counsel from the Encyclopaedia Britannica refer to cast aluminum or aluminum metal, which is essentially pure aluminum. If alloying materials are added to change the properties, these figures will not apply. I believe that the breaks of a semi-circular shape on the top of the vanes on Exhibit 3 could be made by being obstructed by a human finger on which there was a metal ring and the hand enclosed in a canvas or cloth glove. If the [181] obstruction was over the right-hand cross

(Testimony of George Shue.)

member, as you look at the front of the radiator, and was thus hindered in its downward movement when struck by the vanes of the fan, that would increase the probability of making such breaks in the fan.

Q. I will ask you if you have examined that particular break on the cross member on Exhibit 2 to determine whether or not it is a break or merely a surface scratch?

The COURT: Will you please mark the point designated with a red pencil. Do not put it on the so-called break, but next to it.

A. The point to which you refer is about six and a half inches from the center of the fan along the right cross member (the witness marking the point designated).

The WITNESS: With a small microscope I examined the break which is about six and a half inches to the right of the center of the cross member upon which it appears, being the right-hand horizontal cross member on the front of Exhibit 2, and it appears to be a crack. I am familiar with the location of the fan and particularly with the axle of the fan in Exhibit 2 with reference to the motor of the Mack truck from which Exhibit 2 was taken, as I actually saw the motor of the truck before the fan and radiator that are now Exhibit 2 were removed from the truck. The photograph marked Exhibit 7 appears the same as the truck did when I saw it, and indicates the relative positions of the

(Testimony of George Shue.)

fan and pet-cocks at the top of the cylinders as to their being in line. If the fan should fly apart by centrifugal force and the pieces should strike against each other and thus be changed from their plane of flight, I do not believe that the pieces in rebounding could exert a very great force at a position close to the axle of the fan. [182]

Q. I will ask you to state whether or not, in view of the construction and placement of the motor and its parts, the number four pet-cock is protected by a portion of the motor which projects above it from any flying pieces that would come from the rear or left-hand side of the fan?

Mr. MAURY: That is objected to as calling for a conclusion which the jury can draw as well as Dr. Shue.

The COURT: The photographs are designated as a correct representation of the fan and the radiator and are going before the jury. For that reason the objection is sustained.

The WITNESS: The breaking of those pieces of the fan could be caused by any force which causes a bending of the vanes.

Re-Cross Examination by Mr. Davis:

The WITNESS: Any sufficient force that might cause the vanes to bend might break them. I saw Mr. Schurman, using his leg as a fulcrum, break Exhibit 1. It was Archimedes who said in substance, "Give me a fulcrum of sufficient strength and I

(Testimony of George Shue.)

will bend the world"; and that is probably true. I think it was because of sufficient fulcrum that the witness was able to exert a force of five thousand pounds to the square inch. While it might have something to do with it, I think the fact that the fan was running out of alignment would have very little to do with causing a fan to break.

Mr. MURPHY: If it please the Court, there was just one question I wanted to ask the witness who has just left the stand. With the permission of Court and counsel I will return him for that one question. [183]

Mr. DAVIS: We have no objection.

The COURT: Very well.

George Shue, being recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: The relation of the centrifugal force exerted by a spinning wheel and the speed of the wheel is that the centrifugal force is proportional to the square of the speed. In other words, if the speed of the wheel is doubled the centrifugal force is four times as great; if the speed is three times as fast then the centrifugal force will be nine times as great, and so on.

Cross-Examination by Mr. Davis:

The WITNESS: If the speed were ten times as fast, then the centrifugal force would be one hun-

(Testimony of George Shue.)

dred times as great; and if the speed were one hundred times as fast, then the centrifugal force would be one hundred squared, or ten thousand times as great. It would depend on what kind of an obstruction or stationary vane there was outside in order to state how far a man could stick in his finger with the fan revolving at six hundred revolutions a minute without the finger being cut off. In this particular fan he could probably put his finger straight in a matter of a fraction of an inch, because there is room to bend it down.

Redirect Examination by Mr. Murphy:

The WITNESS: I have given the measurement from a point which we have designated as six and a half inches to the right of the center of the fan, which was the distance from the cross member at that point to the fan. The distance between the inside of the [184] cross arm and the vane of the fan at a point an inch and a quarter to the right of the center of the cross member is about one and three sixteenth inches.

Re-Cross-Examination by Mr. Davis:

The WITNESS: I think the lower phalange of the ring finger of the ordinary person is not quite an inch in length.

J. M. DENNIS,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Re-Cross Examination by Mr. Davis:

The WITNESS: My name is J. M. Dennis, and I reside at Deer Lodge, Montana. In October, 1933, and since that time I have been in the employ of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I recall that late in October, 1933, Clifford Gilbert suffered an injury to his hand in or near the shop plant of the Milwaukee Railroad at Deer Lodge, and that the injury occurred in connection with the handling by him of an automobile truck. Shortly after the accident and within a day or so I was assigned to the work of removing the broken pieces of fan from the case. These pieces that I removed were in the case and around immediately in front of the fan. There had been a rim or band on the front or outside of the fan the same as is now on the back. This was broken off and the pieces of it had to be removed with the other pieces of the fan. We had to break some of the larger pieces in order to get them out. All of the pieces that had formed the front rim of the fan were removed. At that time I observed the condition of the fan that remained in the radiator shell.

Q. State whether or not the breaks which you observed there [185] were fresh or old breaks.

Mr. MAURY: He has not shown any qualification to tell whether a break was a fresh break or an old

(Testimony of J. M. Dennis.)

break, and we object to it on the ground that the witness has not shown himself qualified to answer.

The COURT: The objection is sustained.

Q. Will you please state whether the breaks which you observed in the fan were bright or discolored?

A. All bright.

Cross-Examination by Mr. Maury:

The WITNESS: These breaks were all about the same brightness. Possibly Exhibit 3 at the time I cleaned the pieces of fan from the fan case was in exactly the same condition it is now, except that these breaks were all bright instead of discolored. This break which is marked with the red pencil looks more like the other breaks looked at that time. I did not do any repairing, but simply removed the parts. The parts that were taken out were laid on the outside of the engine somewhere. I do not know just what became of them at that time, and I have not seen them since. I know both Mr. J. O. Jones and Mr. Sears, the master mechanic, but I could not say whether either of those men took those pieces or not. Neither could I say whether or not Mr. L. E. Neumen got them. Mr. Neumen is the claim agent for the Milwaukee Railroad and has been such to my knowledge for five or ten years. He is in the courtroom now. I did not notice particularly to see if there were any cracks in this outer rim, but there seems to be a crack in it now. This vane that is

(Testimony of J. M. Dennis.)

entirely gone except for a little nub is in the same condition as it was then, as far as my recollection goes. I did not break the large piece out of the fan from the place marked with red pencil, and [186] I could not say how it got broken out. It does not appear to have been broken out at the time I saw the fan, but I could not say whether somebody has broken it out since that time. I did not try to fit back in any of the pieces to see if they corresponded with the breaks in the fan, nor do I know of anyone else doing so. I could not say whether there were any pieces missing so that if the pieces were fitted back in they would not make a complete fan. The pieces I took out I gathered from the bottom of Exhibit 2. I could not say whether the truck had a radiator cap on it at the time.

Redirect Examination by Mr. Murphy:

The WITNESS: I believe when I finished cleaning out the pieces of the fan I turned the fan to see if it was in the clear or if there were any parts touching any part of the fan. Either Mr. Jones or Mr. Sears assigned me to this work, but I could not say which one.

Re-Cross Examination by Mr. Maury:

The WITNESS: I did this work before the truck was again put in use after the accident.

WALTER STEPHENS,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is Walter Stephens. I am station baggageman for the Chicago, Milwaukee, St. Paul & Pacific Railroad at Butte. I have been employed in that particular position for three years, and I was so employed during the latter part of 1933 and during the year 1934. I received at that baggage-room a package addressed to L. E. Neumen, the claim agent. I could not [187] state approximately when the package was received, but I notified Mr. Neumen when it was received, and Mr. Neuman told me to put the package away for him. I had the package sitting on the shelf for six or seven months, I would say, and finally the superintendent gave us orders to make a general cleanup of everything that was in the baggage-room. I was up in front checking baggage and the men who were cleaning up the baggage-room got hold of this box and threw it onto the pile of rubbish already lying on the floor, and when I walked back I happened to notice there was a fan sticking out of the carton, and I said, "Put that back on the shelf again." The fan was picked up and placed back on the shelf and the carton was dumped in a box car that was standing outside. The fan remained in the baggage-room of which I have charge

(Testimony of Walter Stephens.)
until a couple of days ago, when it was removed by Mr. Neumen.

Cross-Examination by Mr. Davis:

The WITNESS: I did not break this fan, and so far as I know the fan is in exactly the same condition now as it was when it first came to me. I did not see anybody break any part out of it. The carton was thrown away. Whether or not it was empty I could not say.

L. E. NEUMEN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is L. E. Neumen. For a good many years I have been employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and I was in its employ during all of the years 1933, 1934, and up to the present time. Before this fan, [188] Exhibit 3, was brought to Helena for this trial I last saw it at the baggage-room in Butte on Tuesday of last week. The last time previous to that that I saw the fan was while it was still in the truck at Deer Lodge. I was informed by Mr. Stephens that a package had arrived at the Butte baggage-room for me, and I told Mr. Stephens to keep it in the baggage-room for me.

(Testimony of L. E. Neumen.)

Q. Do you know what the container had in it?

A. Yes; I had received word from Mr.——

Mr. MAURY: We move *the* strike the answer, "I had received word." If he knows he must know of his own knowledge.

The COURT: The question can be answered yes or no, Mr. Neumen. Do you know what the contents of that carton were?

The WITNESS: Yes, I did.

Q. Do you know of your own knowledge, by an examination of the carton, what was in it?

A. No.

Q. Did you have any information as to what it contained?

Mr. MAURY: We object to that as not the best evidence.

The COURT: The objection is sustained. If a man doesn't know of his own personal knowledge he cannot testify, Mr. Murphy. That is the limitation of testimony except in certain capacities.

Mr. MURPHY: I think that is true. I don't think it is material in the case. It is simply to show——

The COURT: If it isn't material let's leave it out. We are taking up enough time on material matters without injecting immaterial ones. [189]

The WITNESS: Prior to the beginning of this

(Testimony of L. E. Neumen.)

trial I made a search for the broken parts from Exhibit 3. I knew the fan was at the baggage-room in Butte, and I went there to get it and the parts that were broken from it, but I found only the broken fan.

Q. I will ask you to state whether or not you, before going to get the fan, expected to find the fan and the parts together?

Mr. MAURY: We object to this as leading and not material; and what his psychology on the subject was does not concern anybody.

The COURT: The objection is sustained.

The WITNESS: I made further search for the parts but did not find them, and I do not know where they now are.

Cross-Examination by Mr. Maury:

The WITNESS: Mr. Sears did not hand those parts to me in Deer Lodge, nor did Mr. Jones or anyone else. Dr. Unmack, the doctor who treated the plaintiff, has not been in court during the trial of this case to my knowledge. He was not here Friday that I know of.

Mr. MURPHY: He was not in court, Mr. Maury, but I am perfectly willing to admit and the record may show that he was here during some part of the trial in Helena, but not in the court-room.

The COURT: You say the trial in Helena. You mean the trial now in progress?

Mr. MURPHY: The trial now in progress, yes.

DOCUMENTARY EVIDENCE

Mr. MURPHY: Now, if the Court please, we offer in evidence Exhibit 11. This is the only copy I have, and [190] I ask leave to withdraw the certified copy which I have and make a copy later to be left with the record.

Mr. DAVIS: We have no objections.

The COURT: It is admitted without objection, and Mr. Halloran will make a copy of it, which will, thereupon, be certified by the Clerk of the Court. The original may then be withdrawn and the certified copy substituted in the record in its place.

(The exhibit was received in evidence as Defendant's Exhibit 11, and it is in words and figures as follows:)

DEFENDANT'S EXHIBIT 11

Order No. 1.

In The
District Court of the United States
For the Northern District of Illinois,
Eastern Division.

In Proceedings for the Reorganization of a Railroad

No. 60463

In the Matter of
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor.

ORDER.

Upon due consideration of the petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Com-

pany, the above named Debtor, verified June 28th, 1935, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77 of the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and the Acts amendatory thereof and supplementary there- [191] to; and the Court being satisfied that such petition complies with said Section 77 and has been filed in good faith, it is ORDERED:

(1) That said petition be, and it is hereby approved as properly filed under Section 77 of said Act.

(2) That the Debtor be, and it is hereby, authorized and directed, pending further order of this Court to continue in possession and control of its properties, assets and business, and to run, manage, maintain, operate and keep in proper condition and repair the railroad and properties of the Debtor, wherever situated, whether in this State, Judicial Circuit, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ or discharge and to fix the compensation of all its officers, counsel, attorneys, managers, superintendents, agents and employees (provided, however, that the compensation of all officers of the Company shall continue at the present

rates until further order of this Court and that the attorney or counsel of record for the Debtor in this proceeding or the counsel retained by the Debtor in connection with the preparation and consummation of its Plan of Reorganization shall be paid only such reasonable compensation for services rendered and reimbursement for expenses hereafter incurred as shall hereafter be allowed by this Court pursuant to said Section 77); to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all its outstanding accounts, and all dividends and interest on securities belonging to it; to sell, convey, or lease property, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange [192] and release as are reserved to, or available to, it under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as provided in such instruments, all in the same manner that it would be entitled to do in its own right; and, to the extent necessary to protect, preserve or benefit its railroad or properties or business, to make and pay for additions and betterments thereto and thereof; to perform its existing contracts incurred in the regular course of business to the extent that performance thereof may seem desirable, but such performance shall not constitute an affirmance of said contracts or any thereof; to enter into and perform other contracts in the regular course

of the conduct of its business; all to the end that the business of the Debtor may be continued, operated and managed according to the customary and usual manner of conducting its business; all of the foregoing powers to be exercised by Debtor according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein;

(3) That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the properties, income, franchises, or business of the Debtor?

(b) All necessary current expenses in operating the railroad, preserving the assets and conducting the business of the Debtor, including, among other expenses, the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the Debtor (subject, however, to the provisions of paragraph (2) of this order with respect to the payment of compensation of [193] any such officers, attorneys or counsel); the charges for freight, ticket, switching, car mileage, per diem, switching reclaim, division and all other interline accounts and balances; the consideration of adjustment or compromise of claims for loss, damage or delay to freight, for overcharges and for repa-

ration; joint facility and equipment rental (subject, however, to the limitation hereinafter provided with respect to the payment of principal or interest of equipment obligations covering equipment leased by the Debtor) and expenses and accounts for materials and supplies; also, all sums now due or which may hereafter become due to other persons or corporations for car or equipment repairs or for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad facilities and such sums as may be necessary to comply with the obligations of the debtor under contracts or leases by virtue of which such occupation or use may now or hereafter be enjoyed, but such payments shall not constitute affirmations of such contracts or leases, or any of them;

(c) The following claims incurred by the Debtor within six months preceding the date of this order, to-wit: wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, unpaid and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances,

interline accounts; freight and overcharge claims and accounts [194] for car and equipment repairs incurred by the Debtor;

(d) Claims for or arising out of loss, damage or delay to freight or baggage; overcharges, reparation; adjustments of or refunds for freight or other charges on shipments, including shipments in connection with which there are charges for transit or storage privileges; freight, ticket, switching, car mileage, per diem, switching reclaim and all other interline accounts and balances; rental of equipment or rental of or expense arising from use or operation of or over joint or other facilities; outstanding checks for wages, fees or services; claims for personal injuries to employees which are preferred under the Acts of Congress relating to bankruptcy; and other claims, charges or adjustments of similar character between Debtor and other carriers in the conduct of their joint business, between Debtor and its patrons and between Debtor and its employees; all regardless of when accrued; and the Debtor is hereby authorized, in its discretion, pending further order of this Court, to pay, adjust, compromise, make advances for, or reimburse others for so adjusting, compromising, making advances for, or paying on the Debtor's behalf any of the foregoing claims;

(e) The cost of maintaining the corporate existence of the Debtor, including corporate,

franchise, stamp and similar taxes, fees and expenses, and fees and expenses in connection with directors meetings, such office rent as may be required and the necessary expense of keeping and preserving its corporate records, of maintaining transfer offices and agents, of registering and transferring its securities and of paying the proper charges and expenses of the trustees under indentures or mortgages pursuant to which securities of the Debtor have [195] been issued;

(f) Such allowances as heretofore have been allowed and paid by the Debtor to superannuated employees and employees who have become disabled or incapacitated in the Debtor's service; and

(g) The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this case, in sufficient quantities to provide copies thereof for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause, and others who may have a substantial interest therein; such expense to be taxed as costs in this case;

Until the further order of this Court, no payment shall be made by the Debtor upon or in respect of the principal of or interest on any of its funded debt including principal of or interest on any equipment obligations constituting a lien upon equipment leased by the Debtor, and including therein, without

limitation, all obligations representing funded debt of the Debtor listed in Article I of the Plan of Reorganization dated July 1, 1935, of the Debtor, annexed to said petition of the Debtor and marked Exhibit A.

(4) That the Debtor shall have the power to elect whether to adopt or continue in force, or to refuse to adopt or continue in force or to disaffirm or reject, any lease, trackage, terminal, crossing or operating agreement, or other contract not fully performed to which it is a party or under which it may be obligated; and the Debtor is hereby allowed a period of six months (or such further period as this Court may allow) from the date of the entry of this order to make such election. Any such election may be made from time to time, and shall be made by instrument in [196] writing signed by the duly authorized officer or officers of the Debtor and delivered, or mailed by registered mail, postage prepaid, addressed to, the other party or parties to said lease, agreement or contract; and any such election shall be effective when a copy of such instrument, together with proof of delivery or mailing of a copy or copies thereof as aforesaid to the other party or parties to such lease, agreement or contract shall be filed of record in this proceeding. No conduct or user or rights by the Debtor or payments made by the Debtor as rent or otherwise, or accepted by it as rents or otherwise, or any other acts or omissions by the Debtor during said period (or such other period as this Court may allow) ex-

cept an instrument filed and delivered or mailed as aforesaid expressly adopting any such lease, agreement or contract shall be deemed to preclude or conclude the Debtor in respect of such election or be deemed to constitute an election to adopt or continue in force any such lease, agreement or contract.

(5) That pending further order of the Court in the premises the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights and to make settlement of any thereof; and likewise to defend or to liquidate by written agreement or consent, judgment, decree, order or award any claim, demand or cause of action, whether or not suit or other proceeding to enforce the same has been or shall be brought in any court or before any officer, department, commission, board or tribunal, but no payments shall be made by the Debtor in respect of any such claims accruing prior to the date of this order, or in respect of any actions, [197] proceedings or suits on such claims, without further order or direction of this Court, except such as may be permitted by this or other orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right

in, the property or funds in the possession of the Debtor that otherwise would not exist;

(6) That the Debtor shall close its present books of account at midnight on the 30th day of June, 1935. The Debtor shall open new books of account at the beginning of the day of July 1st, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers or receipts for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected by it and approved by this Court;

(7) That, not later than the 31st day of August, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on the 30th day of June, 1935, and, within forty-five days after the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of the business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month. All such statements shall be certified [198] as correct by the chief accounting officer of the Debtor;

(8) That the Debtor is hereby directed to prepare and file with the Clerk of this Court on or

before 30 days from the date of the entry of this order, in lieu of the schedules required by Section 7 of said Bankruptcy Act, a balance sheet of the Debtor as of the latest practicable date, together with supporting schedules, in the form of annual statements made to the Interstate Commerce Commission, and such other information as this Court may hereafter direct as necessary to disclose the conduct of the Debtor's affairs and the fairness of any plan of reorganization of the Debtor proposed under Section 77 of said Bankruptcy Act;

(9) That the Debtor is hereby authorized and directed within 15 days from the date of the entry of this order (unless a later date be directed by this Court, upon cause shown) to prepare (a) a list of all known bondholders and creditors of, or claimants against, the Debtor, or its property, and the amounts and character of their debts, claims and securities, and the last known post-office address or place of business of such creditor or claimant and (b) a list of the stockholders of the Debtor, with the last known post-office address or place of business of each. The contents of such lists shall not constitute admissions by the Debtor or any trustees of the estate in this proceeding. Such lists shall be open to the inspection of any creditor or stockholder of, or claimant against, the Debtor, during reasonable business hours, upon application to the Debtor or any such trustees;

(10) That all persons, firms and corporations, whatever and wheresoever situated, located or domi-

ciled, be and they are hereby restrained and enjoined from interfering with, attaching, [199] garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portions of the assets, goods, money, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business by the Debtor under the orders of this Court, or from bringing any new suits, actions or proceedings or causes of action accruing prior to this date in or before any Court, Commission or tribunal from which an appeal, or proceeding to review, can be taken only upon the filing of an appeal bond as a jurisdictional or mandatory requirement;

(11) That all persons and corporations holding collateral heretofore pledged by the Debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

This Court reserves full right and jurisdiction to enter at any time further orders in the premises as the Court may deem proper, including the right to amend, extend, limit, modify or otherwise change or rescind the present order.

Enter:

JAMES H. WILKERSON,
District Judge.

Dated: June 29, 1935. 10 A. M. Daylight Savings Time

(Duly certified to by the Clerk of the above entitled court, under his hand and official seal, as a correct copy of order made and entered in said court on the 29th day of June, 1935, as fully as the same appears of record in his office.

THE DEFENDANT RESTED [200]

PLAINTIFF'S REBUTTAL.

JAMES GILBERT,

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Maury:

Q. Mr. Gilbert, you testified on the case in chief that you had this piece of aluminum which has now been broken but which was then one piece. and I am showing you Exhibits 1 and 1-A. What did you do with that piece when you last saw it before this trial?

Mr. MURPHY: That is objected to simply for the reason that it is part of the plaintiff's case in chief, and not proper rebuttal, and too late.

The COURT: The plaintiff is granted permission to re-open his case in chief, if he deems it proper.

Mr. MAURY: We ask that permission of your Honor.

(Testimony of James Gilbert.)

The COURT: Granted.

A. I took that piece home and kept it at the city hall until the case started—until I hired Tom Davis about ninety days after the son got his fingers cut off. Then I took it up to Tom Davis's office.

Mr. MURPHY: For the information of the jury, may the record show that the complaint was verified——

Mr. MAURY: We agree that the complaint was verified April 20, 1934, and that it was filed with the Clerk of the Court on April 23, 1934.

THE PLAINTIFF RESTED IN REBUTTAL.

[201]

DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

Mr. MURPHY: Comes now the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, at the close of all the evidence in the case, and after the plaintiff has announced final resting of the case, and moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff, for the following reasons and upon the following grounds, to-wit:

1. That there is no evidence sufficient to justify a verdict or support a judgment against the defendant.

2. That there is a complete failure of proof to support the essential allegations of the complaint.

3. That there is a failure of proof to establish any negligence on the part of the defendant which is a proximate cause of the injury complained of.

4. That there is a failure of proof to show any violation of duty owing from the defendant to the plaintiff.

5. That there is a failure of proof to support the particular element of negligence or failure of duty on the part of the defendant charged in the complaint.

6. That there is no proof to support notice of a defective condition of the particular instrumentality which is alleged to have given away or failed, thus causing the injury to plaintiff, or any lack of ordinary care to discover the same.

7. That it is not shown that the injury was the proximate result of the negligence alleged.

8. That the evidence discloses that the injury suffered by plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, the danger and risk of which he assumed. [202]

9. That the evidence affirmatively discloses that the instrumentality herein complained of, that is to say, the Mack truck, was a borrowed truck delivered to the defendant by the plaintiff and the guardian ad litem of the plaintiff, acting jointly, and with full knowledge on the part of each of them of its condition, and particularly of its defects, if any.

10. That there is a fatal variance between the allegations of the complaint and the proof herein.

11. That the complaint herein does not state facts sufficient to constitute a cause of action against the defendant.

The COURT: The motion is denied.

Mr. MURPHY: Our exception is noted, I take it.

The COURT: Yes.

Mr. DAVIS: May it please the Court, may the record show that the plaintiff in this case, Clifford Gilbert, has elected to stand upon the allegations set out in the counts in relation to intrastate commerce; and we consent, may it please the Court, to the two counts set out in relation to interstate commerce being dismissed?

Mr. MURPHY: We simply want to renew our motion which the Court has just passed on. I would say, your Honor, that I believe there is no sufficient proof in this case to support the allegation of interstate commerce.

The COURT: On motion of plaintiff's counsel counts one and two, contained in the complaint in this action, are dismissed and a judgment of dismissal as to them is ordered entered. Proceed with the argument on the part of plaintiff.

(Thereupon, the cause was, by respective counsel, argued to the jury.) [203]

The COURT: For the purpose of the record, gentlemen, the Court intends to give the instructions requested by the plaintiff and marked as follows:

Plaintiff's 1, Plaintiff's 2, Plaintiff's 3, Plaintiff's 4, and Plaintiff's 6. The Court refuses to give plaintiff's requested instruction now marked Plaintiff's 5. Has the plaintiff any objection to the order of the Court?

Mr. MAURY: The plaintiff has no objection or exception.

The COURT: The Court intends to give instructions requested by the defendant and marked by the Court as Defendant's 1, Defendant's 2, Defendant's 3, Defendant's 4, Defendant's 12, Defendant's 17, Defendant's 18, and Defendant's 19. The instructions given will be read in the charge and passed to counsel, and you will be given an opportunity at the close of the charge to state your objections. The Court refuses to give the instructions requested by the defendant and marked by the Court as Defendant's 5, Defendant's 6, Defendant's 7, Defendant's 8, Defendant's 9, Defendant's 10, Defendant's 11, Defendant's 13, Defendant's 14, Defendant's 15, and Defendant's 16. Has the defendant any objection or exception to the refusal of the Court to give these instructions?

Mr. MURPHY: We object and except to the action of the Court in refusing to give each of the instructions 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16, separately, for the reason that each is a correct statement of the law applicable hereto not otherwise covered in the charge.

Said instructions so offered and requested by the defendant, and which the Court refused to give, are in words and figures as follows, to-wit:

(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, [204] and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendants behalf.

(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said truck, your verdict should be for the defendant.

(7) It is admitted in this case that the plaintiff just prior to and at the time of the accident had full control, care and management of the entire automobile truck which is alleged to have caused his injury, and if you believe that the accident arose out of and was proximately caused by the method or manner adopted by him in making adjustments in the motor thereof, or by his negligence or inattention in any respect, and not by the negligence of the defendant as charged, you shall render a verdict in favor of the defendant.

(8) If an employee chooses the more dangerous of the two ways to perform a certain act, he assumes the risk of injury therefrom. Therefore, if you find from the evidence that the plaintiff could have corrected the condition of the fourth pet cock on the truck without keeping the motor running, and that it was more dangerous to adjust the same while the motor was running, your verdict should be for the defendant. [205]

(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant.

(10) Where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used.

(11) Therefore if you find from a preponderance of the evidence that the defendant furnished to the plaintiff a truck in a defective condition, which increased the hazard incident to its use, and

the plaintiff was aware of the condition of increased hazard thus brought about, or such condition was so obvious that an ordinarily prudent person of the plaintiff's mechanical skill and personal knowledge and experience with the truck would have observed and appreciated the condition, the plaintiff must be held to have assumed the risk of injury and your verdict must be for the defendant.

(13) The statement in these instructions that the plaintiff must have known and appreciated the danger means simply that he must have known the conditions from which the danger arose. Appreciation of danger is conclusively presumed from knowledge of the conditions even though the plaintiff has testified that he did not in fact appreciate the danger. An employee cannot claim ignorance of a hazard which would be obvious to a reasonable and [206] prudent person under the same circumstances.

(14) One whose duty it is to operate a certain machine is held to a stricter rule of assumption of risk in connection therewith than an employee who has no such duty to operate the machine.

(15) You are instructed that you shall disregard any testimony which you find to be in conflict with physical facts or the law of nature.

(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury.

(The Court charged the jury as follows:)

Now, gentlemen, in the trial of every cause there are several functions to be performed by the several officers of the court. The attorneys for the plaintiff, as well as the attorneys for the defendant, are officers of the court, just as the jurors sitting in the trial of the case and the judge presiding through the trial are officers of the court. Each of us has a separate and distinct duty to perform. It is the duty of the plaintiff and his counsel to present their case fairly so far as known to them and in a light that will sustain the cause that they believe they have. It is the duty of the attorneys for the defendant and the defendant likewise to present fairly the facts that may be known to them and which may prevent a recovery in the case. During the taking of testimony the function of the judge is merely to act as arbitrator and pass upon controverted questions between counsel for the various parties. At the conclusion of the trial it is the duty of the judge to give what is known as the Charge to the [207] Jury. It is his duty, as a matter of law and because of his office, to state to you the legal principles that he believes apply to and should control the decision in the case.

It is not for you to question the law as given by the Court. That is a function of the Court and a duty that he can give to no one else; and whether you believe that the statements of law that I may give to you are right or wrong, you are bound by your oath to take the law as I state it to you.

On the other hand, the Constitution and the statutes of the United States provide and require that in cases of this kind the facts shall be decided by the jury. A jury of twelve men is called upon to hear the testimony, to observe the witnesses during the trial of the case, and after learning from the Court what the law is, to decide the case, as counsel have stated, not according to the wealth or standing of the parties, not in the light of sympathy that a jury may have for a party suing or being sued, but merely in the light of the law and the facts as they appear to them from the testimony of the case, and to decide the case fairly on the law and the facts.

I cannot agree with the statement of counsel in argument that you have made up your minds in this case, because every time we took a recess you were admonished by the Court that you should not form an opinion as to the merits of the case. It may be that the argument of counsel and the instructions of the Court are not going to have any influence. I feel that they will, and I feel that the argument of counsel has assisted you in knowing what the facts in the case are and in recalling them. I know that you will take the law as I give it to you.

In every lawsuit the party coming into court is required to file what is known in law as a Complaint, which contains the [208] facts on which he bases his right of recovery; in other words, a statement of the things that he says in law give him a right to the judgment that he asks. In every law-

suit a defendant is given a right to come into court and admit or deny the allegations of the complaint. If he admits an allegation the fact is taken as true by you and me; if he denies an allegation of the pleading, it casts upon the plaintiff the burden of proving by a preponderance or the greater weight of the evidence the truth of the allegation contained in his complaint. In addition, the defendant has a right in his answer to set out what we call affirmative defenses—defenses which, in effect, admit the truth of the allegations contained in the plaintiff's complaint, but say, notwithstanding the facts stated in the complaint are true, there are other facts which prevent his right to recover in this cause. In this case the defendant has taken advantage of its right to admit, of its right to deny, and of its right to state what we call pleas by way of confession and avoidance; that is, conceding all of the facts stated by the plaintiff to be true, there are facts which will prevent him from recovering in the case which he has brought. And in its answer the defendant has pleaded by way of affirmative defense and by way of confession and avoidance what is known as the defense of contributory negligence and what is known as the defense of assumption of risk.

In this case it seems to me that there is very little controversy on many facts. The plaintiff, in his first cause of action, alleges that he was employed by the defendant. There seems to be no controversy upon that point. Now, gentlemen, I am commenting

on the evidence. As I told you before, it is for you to determine and to decide finally what the evidence does [209] show. I have the right to express my opinion upon the evidence, and I shall do so in this case in the hope that I may assist you. The plaintiff has stated in his complaint, in the beginning, four causes of action. The first and second causes of action are based upon the theory that the defendant and the plaintiff were engaged in interstate commerce at the time the plaintiff received the injury of which he complains. Now, gentlemen, I suggested to counsel that in my opinion the evidence is not sufficient to show that either the plaintiff or the defendant was engaged in interstate commerce; that is, commerce crossing state lines—beginning in one state and ending in another; and upon that suggestion being made, counsel dismissed the first and second causes of action. The dismissal of those causes must not lead you to think that I believe the plaintiff started a case that he had no right to bring into court and submit to you for decision. It merely means that he availed himself of a right which the law gives to state his cause in varying theories, so that the Court will be justified in permitting him to prove the facts from which it may be determined upon which cause, if any, he shall succeed.

The third and fourth causes, which now remain before you for decision, are based upon what is known as the law of Montana regulating railroads.

That statute applies only to commerce within state lines. It is very similar to what is known as the Federal Employees' Liability Act, which act applies only to commerce and to men and companies engaged in commerce between states. The Montana law relates to this case, as I view it. It is not shown that anything the plaintiff in the case was doing at the time he was hurt was extending across state lines. There is nothing in the testimony, as I view it, showing that the defendant was at that time, and in the particular work then had, engaged in trans- [210] porting anything from state to state. So, as I say, plaintiff having, for the purpose of safety, based his cause upon two laws, the first, the Federal Employees' Liability Act, and the second, the law of Montana regulating its railroad companies, which latter applies only to intrastate commerce or commerce within the lines of a single state, we have the case now showing the same facts but based entirely upon Montana law.

The matters pleaded by the plaintiff in the third and fourth causes of action, and also in the first and second, are based upon the fact that the defendant was at the time of plaintiff's injury engaged in operating a railroad in the State of Montana. There is no controversy upon that. All the parties agree and show by their testimony that that was a fact.

The next element necessary is the employment of the plaintiff by the defendant in the work that it was doing within the State of Montana, or, spec-

ifically, in the vicinity of Deer Lodge, in Powell County, in this state. All the witnesses agree, whether they are witnesses for the plaintiff or the defendant, that he was so employed.

The causes of action before you allege that his employment consisted in the operation of a truck furnished by the defendant for his use in removing certain debris from railroad ground, which debris was caused by a fire at the railroad shops and roundhouse of the defendant corporation in Deer Lodge, Montana, in October, 1933. All of the testimony shows that.

There is no dispute as to the injury that the plaintiff in this case suffered. The plaintiff has told you what the injury is. The defendant's witnesses, from the master mechanic to the first aid man, have told you that the plaintiff received the injury that has been shown here while he was working upon the [211] truck that the defendant provided for his use in carrying on the work.

There appears to be no controversy among the witnesses here that at the time the injury was received the truck had stalled because of some internal trouble. There seems to be no controversy between the witnesses of plaintiff and defendant concerning the fact that the plaintiff in the case had raised the hood of the truck and was trying to make some adjustment for the purpose of causing the machine with which he had to do his work to operate as it should operate, so that he might

carry on his work and do the service that he had been hired or employed to perform.

So, as I say, every element in the case appears to be admitted by all the parties except the question as to whether the injury to plaintiff, which it is conceded by all the parties the plaintiff suffered, was received as a result of some neglect or failure of duty on the part of the defendant in the case. And that simmers down to a single question as to what the condition of the truck was and what were the exact facts concerning the receipt by plaintiff of his injuries.

The complaint proceeds upon two theories, and plaintiff has a right, as I say, under the law to state different theories, so that evidence covering the entire situation may be brought to the attention of the Court and the jury on the trial of the cause. Plaintiff is required to state the different theories of injuries in separate counts, and hence the two counts in the complaint remaining for consideration.

In the first count under consideration here (the third count of the complaint) the plaintiff bases his right of recovery upon what he contends was a breach of the duty of the defendant to furnish him with a reasonably safe tool and appliance with which [212] to carry on the work that he was called upon to do in the course of his employment. The question under that cause of action is: Is it shown by the testimony in this case, considered in its entirety, by a preponderance or the greater weight

of the evidence, that the allegations of the third cause of action stated in the complaint are true? In other words, boiled down, the question under that cause of action for you to determine is: Does it appear from the greater weight of the testimony in this case that the defendant failed to provide plaintiff with a reasonably safe place to work and a reasonably safe appliance to work with?

The second cause of action that is now before you for consideration (the fourth count of the complaint), in all essential statements of fact, is identical with the first that you are to consider, except that in the fourth count the plaintiff alleges that the defendant failed to inspect and repair the instrument with which he was required to work, and that as a result of that failure to inspect and repair he received the injury of which he complains. That is the question, as I say, under the second cause of action that is to be considered by you. In considering this question it is for me to determine what the duties of the defendant were at and immediately prior to the time when plaintiff received his injuries, and what the rights and duties of plaintiff were at that time, and for you to determine what the weight and effect of the evidence is. It is the right of the plaintiff and defendant to request the Court to give certain instructions that they believe to state the law. It is the duty of the Court to give instructions requested if it feel that the proper rules are stated for application to the

facts as disclosed by the testimony and the pleadings in the case. There are certain instructions requested which do, in my opinion, state [213] legal principles that should be given to you as the law in this case. These instructions are as follows:

You are instructed that no presumption of negligence arises from the happening of an accident, or from the fact that plaintiff was injured. The burden is upon the plaintiff to show by a preponderance of all the evidence—a preponderance of the evidence merely means that degree of evidence which satisfies you of the existence of a fact, or the greater weight of the evidence—a breach of duty owing from defendant to plaintiff in the particulars charged in the complaint—as I have told you, the particulars charged in the complaint are that the defendant failed to provide the plaintiff with a reasonably safe place to work and a reasonably fit and proper tool or appliance for the carrying on of his work, or a failure to inspect that tool or appliance once it had been supplied, and to make repairs which were necessary to make it safe for the use that he was required to make of it—and amounting to negligence as negligence is defined in these instructions, and to show further by a preponderance of the evidence that the injury complained of proximately resulted from such breach.

You are further instructed that a negligent act or omission cannot be the proximate cause of an injury unless it is of such a character that a person

of ordinary intelligence under the circumstances of the case could have foreseen that the injury complained of, or some injury to the plaintiff, was likely to be caused thereby.

The test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence [214] of the act or omission, if any, of the defendant or its agent. This does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position where he sat in driving the truck to get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular

rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing.

You are instructed that the defendant in this case is not to be held responsible for latent or hidden defects which could not be discovered by the exercise of reasonable care on its part in the examination and inspection of the fan which is alleged to have exploded and caused the injury to the plaintiff herein. Your consideration is not confined to an explosion of that fan, for it is pleaded here that the fan became jammed and broke and did explode. So you have a right to consider whether that [215] fan did or did not become jammed and break. From my hurried examination of Exhibit 3. the fan, with reference to the recent break that is marked red, it appears to me that there is another break in that fan on one of the edges that appears to be of about the same color as the break into which Exhibit 1 was found to fit. That is a circumstance that you have a right to consider in determining whether or not there was an obstruction which caused the piece here in evidence as Plaintiff's Exhibit 1 to be broken from and fly out of the fan.

You are instructed that if you believe that the injury complained of was accidental in its nature,

and arose unexpectedly under circumstances which could not reasonably be foreseen, then, even though you may believe that the fan exploded and that such explosion was the proximate cause of injury to the plaintiff, there is no liability to the plaintiff, and your verdict must be for the defendant. I am giving you this instruction merely as a matter of precaution. It is for you to say, though I doubt you can properly say, that the injury complained of was one which was entirely unexpected or entirely accidental in its nature. In law it was not entirely unexpected, and it was not purely accidental, for the facts and conditions surrounding the employment of the plaintiff in the case and the mechanism with which he worked were such as to cause one with knowledge of such matters to reasonably conclude that some injury might occur to the one operating that machine.

You are instructed that if the plaintiff knew of any defect in the truck furnished him by the defendant, or if the defect and risk were so obvious that an ordinarily prudent person under the same circumstances would have observed and appreciated them, then by his continuing in employment without objection or without [216] obtaining from the defendant any assurance of remedying the defect, the plaintiff assumed the risk of injury, even though it arose out of the defendant's breach of duty. Now, gentlemen of the jury, we have the testimony of one witness in this case produced by the defendant, the witness Schurman, who testified directly, if my recol-

lection is correct (it is for you to decide the question), that he had tried to drive that machine. That on the first trip he was required to do what? He was required to get out and make an inspection of the machine. Why? Because the motor heated and it commenced to misfire. In other words, the machine was not firing properly, he said, and so he got out and examined the pet-cocks. Now, it appears from that testimony that he was there confronted with the same situation that the plaintiff in this case was confronted with when he was driving the machine prior to the accident. The motor heated, the machine was not firing or operating properly, and Schurman got out and did what the plaintiff was trying to do. He got out and examined the pet-cocks on the car. He said he found them what? Full of carbon; and that he cleaned the carbon out. He then said. if my recollection is true (it is for you to decide), that he examined the ignition and the sparks; and he then said, as I recall it, that he did not go any further because he could not make any further inspection without taking the machine down and taking it apart. It is for you to say whether, under that condition, this young man knew, or in the exercise of ordinary care could know, of the condition of something that he could not reach, that he could not get to to make an examination of, that could not be examined by him, if we believe the witness Schurman, without taking the machine down and taking it apart.

You are further instructed that the plaintiff has alleged [217] that he was injured in a certain specific manner—no doubt about the manner in which his finger was cut off and another finger injured—as a result of certain alleged acts of negligence on the part of the defendant. You are instructed that the plaintiff has the burden of proving his case by the preponderance of all the evidence, and, therefore, if you find that the evidence is evenly balanced, or that the manner of happening of the injury is as consistent with some other explanation as with the allegations of plaintiff's complaint, then the plaintiff has failed to sustain his burden and your verdict should be for the defendant. In this case it appears to me that there are only two theories. The plaintiff says that the fan exploded or became obstructed and broke, and that a piece flew out and cut off one finger and injured the little finger. That is either true or it is not. The defendant's theory appears to me to be that the plaintiff stuck his finger into that revolving fan. Now, you have a choice of one of those two theories.

You are instructed that the plaintiff, in order to recover, must prove by a preponderance of the evidence one or more of the acts of negligence alleged in his complaint, and, further, that such act or acts of negligence proximately caused the injury complained of, and if the plaintiff fails in either of these requirements, your verdict shall be for the defendant. The acts of negligence charged are the failure to provide a reasonably safe place to work

and a failure on the part of the defendant to provide the plaintiff with a reasonably safe appliance to work with and a failure on the part of the defendant to provide the plaintiff with an implement that had been inspected and reasonably repaired, if required. So far as the proximate cause of the injury is concerned, that will be defined to you later. [218]

You are instructed that a person cannot be held liable for an injury without substantive proof that it was caused by negligent acts of his. The burden of proof in this respect is upon the plaintiff in this case, and unless you believe from a preponderance of the evidence that the plaintiff's injury occurred in the manner alleged in the complaint as a direct and proximate consequence of the alleged negligent act or acts of the defendant, your verdict should be for the defendant. If you find that the manner in which the injury was incurred is not established by the evidence, your verdict should be for the defendant.

Clifford Gilbert, the plaintiff, has brought this action against the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for damages for personal injury which Gilbert alleges were proximately caused by the negligence of the railroad company, while he, Clifford, was engaged in intrastate commerce as a servant of the railroad. As I say, there seems to be no controversy upon that point, that he was so engaged. The railroad com-

pany has denied that it was guilty of any negligence which proximately caused injury to Gilbert. On this issue the burden of proof is placed by law on the plaintiff to prove his case by a preponderance of all the evidence, taking that of plaintiff and defendant together, before he can recover; that is to say, if the evidence is evenly balanced or preponderates in favor of defendant on this issue, your verdict must be for the defendant. The railroad company has asserted in its answer that if Gilbert was injured, as alleged in his complaint, it was due to some risk which he assumed or is held by law to have assumed. The defense of assumption of risk is in affirmative defense, which means, gentlemen of the jury, that the burden is upon the defendant in this case to prove that defense by a preponderance [219] or the greater weight of the testimony. Whenever a plaintiff in such a case as this proves by a preponderance of the evidence that he has been injured through some negligent act of the defendant, then the burden has shifted, and in order to defeat the plaintiff's claim by a plea of assumption of risk, the defendant, that is, the railroad company here, must prove by a preponderance of the testimony that plaintiff did assume, in fact or in law, the particular risk which caused the injury. And if the evidence is evenly divided on this issue or preponderates in favor of the plaintiff, that is, Gilbert, in this case, then your conclusion and verdict on this issue must be in favor of the plaintiff and against the railroad company; and, in such event, you must find that

Gilbert did not assume the risk which caused his injury. The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. I wish to state, Mr. Maury, for the record, that I have stricken from this instruction, Plaintiff's 1, certain words. If at the conclusion of the charge you wish to object to that striking, you will be given an opportunity. The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. That question is for your decision. If you find that Gilbert did do some negligent act or omitted to take some ordinary precaution, and such contributed to his being injured through the negligence, if any, of the defendant, that fact does not prevent Gilbert's recovering in this action. Such contributory negligence, even if proven, only goes in reduction of damages, as hereafter explained. The burden of proof as to the issue of contributory negligence is on the railroad company here. That burden, throughout the case, is to prove by a preponderance or the greater weight of the testimony. Un- [220] less you find from a preponderance of all the evidence that Gilbert did commit some act or omission of a negligent nature, and that such was a proximate cause of his injury, you will find this issue in favor of Gilbert and against the railroad company.

If, under the law as I have given it to you, and evidence, your verdict is in favor of Gilbert and against the railroad company, it will be your duty

to assess Gilbert's damages and write the amount of your verdict for him. In arriving at the amount of damages that you should award Gilbert, if your verdict is for him, you must fully and fairly compensate him for such loss, if any, as the injury has caused him, and then, if he were guilty of any contributory negligence, the amount of damages shall be diminished by the jury in proportion to the amount of negligence attributable to Gilbert. In determining the amount of damages without diminution—and in this case the evidence may convince you that there should be no diminution (there should be none unless you find it appears by a preponderance of the evidence that the plaintiff was guilty of some act of neglect which directly contributed to the injury that he suffered)—if your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn money caused by the injuries, whether part, present, or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as [221] determining what amount would be required to buy an annuity for life, equal

to the loss, with some responsible life insurance company. Gilbert has sued for $25,000. This sum claimed must not be to you any criterion of the amount of your verdict, if for him, but your verdict must not be in any event in excess of $25,000. In this court no verdict can be reached unless all twelve of the jury agree to it.

It is a duty required by law of the master, whether the master is a corporation or an individual, to use reasonable care to furnish for the servant appliances for use in the work of the master which are reasonably safe and ordinarily free from danger, and in the absence of notice or knowledge to the contrary the servant may presume that the master has done its duty in this respect. At this place I want to tell you, gentlemen, that the law is that an employee has a right to presume that his employer has used reasonable care to provide him with a reasonably safe place in which to work and with reasonably safe tools and appliances with which to work. The employee is not required, as a matter of law, to inspect the tools and determine for himself that they are not reasonably safe for the use that he is to put them to. He has a right to start with the presumption that the tool or appliance is reasonably safe for the use that it is intended to be put to, and that the place where he will be required to work is reasonably safe for him to work in. The master is under a duty of giving a reasonable inspection for danger in an appliance before

ordering a servant to use the same, if there is anything about the appliance which is known to the master or which would be known by a man of reasonable prudence and which would cause a reasonably prudent person to believe the appliance was dangerous to be used by the servant. Now, as a necessary incident of furnishing a reason- [222] ably safe place to work and a reasonably safe tool or appliance with which to work, the duty is upon the master, first, to use reasonable care for the purpose of determining that the place the man is to work or the appliance or tool with which he is to work is in a reasonably safe condition for use by him. That is a continuing duty, which means that the defendant cannot escape liability merely because he has once used reasonable care to put the place where the work is to be done or the appliance or tool with which it is to be done in a reasonably safe condition for use. It is the master's duty to inspect, and where it appears reasonably to be needed for the safety of the men working in the place where the work is done or with the appliance or tool with which the work is done, to repair wherever there is danger, or it may reasonably be said that the place or the instrument or tool is not reasonably safe for the use that it is intended to be put to. Now, that is the theory of the case: the first cause of action, a failure on the part of the defendant to furnish a reasonably safe place, tool and appliance; and, secondly, a failure to in-

spect for the purpose of determining whether the then condition of the place, instrument or appliance were dangerous to the man operating the instrument or appliance.

You are charged, gentlemen of the jury, that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict. And, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the parties, the evidence offered should be viewed with distrust. This, in simple language, means just this: if one party has the means of producing a thing in evidence and fails to produce it, [223] the presumption is that it would be against his contention in the event that it were produced. Now, gentlemen, digressing for a minute, there is some contention apparently in this case which might cause one to believe that the defendant has an idea that Exhibit 1 was broken from the Exhibit 3 of the defendant at some date later than the date of the injury. I wish to suggest this for your consideration: the testimony shows, as I see it, that at the time of the injury to the plaintiff in this case that fan was in the control and possession of the bosses for the defendant at its shops in Deer Lodge. Clifford Gilbert never got near that fan again until it was brought into court here. He left in the care of the

first aid man to go to the doctor's office, and, so far as the testimony shows, he never went back. The defendant's witnesses state that the broken parts of the fan were removed from the radiator, or the race, as they call it, and that they were put in a sack by the agents of the defendant corporation. They further tell you, gentlemen of the jury, that that sack was put in the machine shop of the defendant at Deer Lodge and that its contents remained there in the possession of the defendant and its agents until, if you take that view of the testimony of the defendant's witnesses, two of whom I believe to have so testified, they gave that sack and its contents to Mr. Neumen, the claim agent. He denies that they gave it to him. However, Mr. Neumen says that a box was sent to him. The station agent in Butte, I believe, stated upon the witness stand that that box remained upon a shelf and in his possession for a period of six or seven months, and that after it had remained there for that period the master mechanic, as I recall it, or general superintendent, perhaps, directed that there be a cleanup made, and that the carton containing this Exhibit 3, the fan, was taken [224] down by someone who was assisting for the purpose of throwing it into a car into which the refuse was being thrown by the defendant's agents, and that the carton broke and that the agent noticed that it contained a fan and that it was the fan in evidence here as Defendant's Exhibit 3, and that upon

making that observation he again put that fan upon the shelf, where it remained until Leslie Neumen came and took it. Now, you can consider those facts and decide whether there is any chance or possible reason for concluding that the Exhibit 1 is not a part of that fan or that it was broken from the fan at a time later than the injury to plaintiff here. The instruction that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust, is evidently requested for the purpose of calling your attention to the fact that the parts needed to complete this fan are not produced, and the further fact that the photographs of the fuzz said to have been upon that cross member were not produced here, or that the photographs of the finger-prints said to be upon one of those leaves or cross members were not produced here. In arriving at a decision in the case, gentlemen, you have a right to consider all the facts and circumstances. The fact is that they did take photographs on behalf of the defendant and they produced them here in evidence as Exhibits, I believe, from four to seven. I am not certain as to the numbers. But they did not take a photograph of the finger-prints and they did not take a photograph of the fuzz, so far as you and I are concerned. It appears, and you will also note, that at that time the plaintiff here was under a doctor's care with

a finger off and another crushed, and a hand hurt, and was not in possession [225] of the machine so he could make any examination of any kind which would enable him to contradict these statements of the defense. It appears that soon after young Gilbert was injured pieces broken from this fan in evidence were collected by servants of the railroad and delivered to one Leslie Neumen, a claim agent of the railroad, who was said by a witness for the railroad to have been present in court here during this trial. Those pieces have not been presented in evidence for your inspection, and the statement was made by one of defendant's witnesses that they would not be presented in evidence. You may draw your own conclusions from such conduct as to whether those pieces of the fan, if shown to you, would have convinced you that some contention of the railroad defendant was false, or convinced you that statements of the plaintiff, Gilbert, were confirmed by the physical facts. In that connection, gentlemen, you recall that Mr. Neumen was called to the witness stand and that he made an explanation; and I charge you that as to that part of the testimony you may believe his explanation to be credible or you may believe it to be incredible. It is for you to determine.

You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperate zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years.

Now, gentlemen, in arriving at a conclusion in a case it appears to me that there are other principles of law that should be called to your attention. Those principles relate to the weight and effect of testimony and the manner in which you shall determine the effect of the evidence here.

Evidence is the means sanctioned by law for the proving of a fact, but in proving facts the law does not require demonstra- [226] tion, for such a degree of proof is rarely possible. All that it requires is that the plaintiff here shall produce evidence which reasonably causes you to believe that he was injured at the time and in the manner alleged and as a proximate cause of some act of neglect on the part of the defendant in the case. These facts may be proven by evidence which is either direct or indirect It may be by the statements of witnesses in court, or it may be by the presentation of physical objects to the view and consideration of the jury.

The direct evidence in this case shows to me that there is little conflict in the testimony of the witnesses given from the witness stand as to the condition of the truck, as to its age, as to the fact that it would heat and when heated it would not operate properly, and as to many other matters. There is no conflict as to the fact that the machine was an old machine. That was testified to by Gilbert for the plaintiff, who said he knew the truck in 1923, that it was given to the city of Deer Lodge by the State Highway Commission twelve years ago, that it was used for three or four years in Deer

Lodge after it reached that point and was put out of commission because it would not work. William Arthur drove the truck involved for two months in the spring of 1932. He said it was an old Mack truck. Sears, the master mechanic for the defendant company at Deer Lodge, said the truck involved here was an old army truck Albert Schurman, who drove the truck for three days before the accident at the defendant's request, said it was a 1915 model. Now, that is one of the facts you have a right to consider—whether the truck was reasonably fit for the use that it was to be put to, and whether it was reasonably to be required of the defendant that it examine the truck and make repairs, if repairs were needed. [227]

Now, the fact that the truck was not in very good condition may also appear from the testimony of Gilbert, who said, as I recall his testimony, that when that truck was taken down to the Milwaukee and delivered to the agents of the Milwaukee Railroad it had to be towed. It apparently would not go on its own power. Then the testimony of Gilbert and of Arthur and of Schurman is that the truck would not start. You have a right to ask yourselves whether that was a circumstance which might reasonably cause the defendant to believe that it was not safe to operate the truck or that it might reasonably require an inspection and repair of it. Clark Cutler said he used the truck in hauling crushed rock quite a long time, probably three or four months, and that he had to tow it two or three blocks to get it started. Albert Schurman, who drove this

truck for the defendant company at McLeod's request, said that he had trouble in starting it. He also told you he had to tow it. Then Gilbert told you that the gears could not be shifted. So you have a truck that would not start without being towed and in which the gears could not be shifted. You can ask yourselves if those are facts that would cause one reasonably to make an inspection to determine whether the truck was safe to use. I imagine if the wheels on a locomotive stuck someone would consider it time to inquire into the condition of the locomotive.

Then we find from the testimony of the plaintiff's witnesses and the testimony of the defendant's witnesses that when the fan rotated it would grind and knock. There seems to be no controversy about that. Now, it is for you to say what reasonably might cause that grinding and knocking and whether it would reasonably be proper to require the defendant in the case to inspect it and find out what caused it. There is no controversy that the [228] motor heated. William Arthur and Clark Cutler, the plaintiff's witnesses, and Albert Schurman, the defendant's witnesses, all said that it did heat. Clark Cutler said that the belt broke. Arthur said that he drove the truck two months in the winter of 1932 and that the fan belt broke while he was driving the truck. Clark Cutler said that he drove the machine in 1933 and that the belt broke and he could not figure out what caused it to break. Now, gentlemen, those are facts that you have a right to consider in determining the issues in this case.

Now, as I say, the duty is upon the defendant to use reasonable care to furnish the plaintiff with a reasonably safe place in which to work and to use ordinary care to provide him with reasonably safe tools and appliances at all times during the course of his work. If the testimony shows that the defendant has failed to do that and that as a proximate result thereof the plaintiff was injured, you should find for the plaintiff, unless the affirmative defenses are shown.

The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which it would not have occurred.

Now we come to the affirmative defenses set out in the answer. The defendant alleges that the plaintiff was guilty of contributory negligence. The effect of that negligence, if any, is fixed by the statute of this state, and as a result of that statute contributory neglect does not bar recovery. Contributory neglect is a failure to do what a reasonably careful person would do under the circumstances of the situation which resulted in injury to him. Now, you may ask yourselves, Is there anything to show that the plaintiff in the case did anything which a reasonably prudent man would not ordinarily have done under a like [229] situation? The presumption is that he used reasonable care for his own safety. That presumption may be overcome by the facts in the case, as seen by you; but we have a witness for the defendant in the case who said that he had done the identical thing that

the plaintiff did. So you may ask whether there is any real reason to believe that there was contributory neglect on the part of the plaintiff in the case. But whether there was or was not, the statute says that, "In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this act, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

With reference to the assumption of risk the statute provides that, "An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer"; which merely means that he does not assume any risk growing out of a failure on the part of his employer to do anything that a reasonably prudent man would have done to provide him with a safe place to work or with safe tools or appliances to work with.

Now, it appears again, gentlemen, from the statements in the pleadings here which seem to be admitted, that the plaintiff in the case was at the time of this injury less than twenty-one years of age. That is an element which you have a right to consider, for this reason: that until they reach maturity they are not considered in law to be able to provide or care for themselves; [230] and where

one sees fit to hire an employee under twenty-one years of age, it is his duty to exercise a greater degree of care and caution for the protection of that employee than it would be if one were hiring a man of mature years, who knew, could see, and could understand with reference to ordinary risks and the assumption of risks. The rule is that the nature elements of the doctrine of assumption of risk, as applied to employees of intrastate carriers under the Montana law regulating railroad business, have been well established in a series of controlling decisions.

Now, these assumed risks are of two kinds, ordinary and extraordinary.

Ordinary risks are those that are known to be incident to the occupation in which the employee voluntarily engages; that is, the things that no degree of care and caution can prevent the existence of. We all know that a man working on a railroad line is in a place of danger from the time he starts until he finishes. They are things that cannot be controlled by the force of man. Those things that a man cannot control and that a man going into the employment assumes as a part of his employment are the ordinary risks. An employee is presumed to have knowledge of such risks and to assume the risk of injuries therefrom. Such ordinary risks are assumed by an employee, whether he is actually aware of them or not. They exist in the business and they cannot be taken out of the business; they are there. It is just too bad, but no one

can help it. And it is presumed that the dangers and risks normally necessary and incident to his employment are taken into consideration in fixing the rate of pay.

But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise [231] due care with respect to providing a safe place to work and safe and suitable appliances with which to work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming those extraordinary risks arising from defects due to the negligence of the employer, unless he has knowledge of them and of the dangers arising therefrom. You will note there, gentlemen. that mere knowledge that there is a defect in the machinery does not bar recovery unless it be further shown that the danger incident to the known condition was appreciated by the person who was injured, and particularly so where the person who suffers the injury is under the age of twenty-one years, or a minor, as we call him. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the dangers arising from them or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger.

Now, gentlemen, one question for you to solve is this: Did the defendant use reasonable care to provide the plaintiff with a reasonably safe place in which to work and with reasonably safe appliances or tools to do the work? If you answer that question in the negative, you should find your verdict for the plaintiff, on the third cause of action.

Another question to be decided by you is this: Did the defendant in the case use that degree of care and caution, with reference to the making of inspections and repairs of the machine employed in this case, which a reasonably prudent person would have used under the same or similar circumstances? If you find that [232] the defendant did not do that, your verdict should be for the plaintiff on the fourth cause of action.

On the other hand, if you find from the evidence here that the plaintiff should recover and also that he was guilty of contributory neglect, that is, that he failed to use that degree of care and caution which a reasonably prudent person under the same situation would have used, and that because thereof he was injured, you may diminish the amount of plaintiff's recovery; but you cannot deny to him recovery in some amount that you deem proper.

If, on the other hand, you should find that the risk of injury such as the plaintiff suffered was one which no foresight or no degree of care and caution on the part of the defendant in this case could prevent, then you will find that the plaintiff assumed

that risk. But if you find from the evidence in the case that the risk was not open and obvious, that it was not such that he must appreciate it, and that it was such that reasonable care and caution on the part of the defendant in the case could have done away with, your verdict must be for the plaintiff so far as the assumption of risk theory is concerned.

Now, the failure to provide a reasonably safe place and appliance and the failure to make the necessary inspection and repair are alleged by the plaintiff in the case, and the burden is upon him to prove these allegations by a preponderance of the evidence. Contributory negligence on the part of the plaintiff, proximately causing the injury, is an affirmative defense which the defendant is required to allege and prove by a preponderance of the evidence. There the burden shifts. That also applies to the so-called defense of the assumption of risk.

Now, gentlemen, when you retire you will elect one of your [233] number foreman. When you arrive at a verdict the verdict will be signed by the foreman and he will return it into court.

Mr. GARLINGTON: If the Court please, the defendant takes the following exceptions to the Court's charge in the instructions to the jury at the conclusion of the arguments in the case:

The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan.

The COURT: The objection is overruled. You may have an exception.

Mr. GARLINGTON: The defendant further excepts to the charge of the Court in that it was stated that the witness Albert Schurman had made no examination of the fan——

The COURT: Did I make such a statement, that Albert Schurman had made no examination of the fan? My recollection of it is that he examined the pet-cocks and the ignition system, and said that he had not been able to make a further or complete examination without taking the machine down and taking it apart.

Mr. GARLINGTON: I believe those are the words of the Court; [234] and, as we recall the testimony of the witness Schurman, he testified that

he examined the fan, but that any further examination would have to result in the truck being taken apart.

The COURT: The jury are further instructed that the witness Schurman testified that he inspected the truck after he had made the first trip; that the radiator was getting warm and he examined the fan belt; that there was no wobble and little end-play; that he looked at the magneto and wiring and they were o. k.; that he could make no further inspection without taking down the machine and taking it apart.

Mr. GARLINGTON: We withdraw our objection. The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

Mr. GARLINGTON: We further except to the giving of Plain- [235] tiff's instructions numbered 1, 2, 4, and 6, as given by the Court, and to each of said instructions separately, for the reason that they do not correctly state the law applicable to the evidence and the issues in this case.

The COURT: These objections are overruled and an exception is granted.

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an exception, and that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious that where a man has lost the third finger of his right hand and has practically lost the little finger (it is an encumbrance rather than a help) that the jury may consider the reduction in his earning capacity. They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: That is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts [236] are for you, and the law is for me.

(Plaintiff's instructions numbered 1, 2, 4, and 6, referred to by counsel for defendant in his objections to the Court's charge to the jury, are as follows:)

1.

Clifford Gilbert, the plaintiff, has brought this action against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for damages for personal injury which Gilbert alleges were proximately caused by the negligence of the railroad company, while he, Clifford, was engaged in intrastate commerce as a servant of the railroad.

The railroad company has denied that it was guilty of any negligence which proximately caused injury to Gilbert. On this issue the burden of proof is placed by law on the plaintiff to prove his case by a preponderance of all the evidence, taking that of plaintiff and defendant together, before he can recover; that is to say, if the evidence is evenly balanced or preponderates in favor of defendant on this issue, your verdict must be for the defendant.

The railroad company has asserted in its answer that if Gilbert was injured, as alleged in his complaint, it was due to some risk which he assumed or is held by law to have assumed. The defense of assumption of risk is an affirmative defense.

Whenever a plaintiff, in such a case as this proves by a preponderance of the evidence that he has been injured through some negligent act of the defendant, then the burden has shifted and in order to defeat the plaintiff's claim by a plea of assumption of risk the defendant, i. e. railroad company here, must prove by a preponderance of the testimony that plaintiff did assume in fact, or by law, the particular risk which caused the injury: and [237] if the evidence is evenly divided on this issue or preponderates in favor of plaintiff, i.e. Gilbert, in this case, then your conclusion and verdict on this issue must be in favor of the plaintiff and against the railroad company and in such event you must find that Gilbert did not assume the risk which caused his injury.

The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. That question is for your decision. If you find that Gilbert did do some negligent act or omitted to take some ordinary precaution and such contributed to his being injured through the negligence, if any, of the defendant, that fact does not prevent Gilbert's recovering in this action; such contributory negligence, even if proven, only goes in reduction of

damages, as hereafter explained. The burden of proof as to the issue of contributory negligence is on the railroad company here. Unless you find from a preponderance of all the evidence that Gilbert did commit some act or omission of a negligent nature, and that such was a proximate cause of his injury, you will find this issue in favor of Gilbert and against the railroad company.

2.

If, under the law, as I have given it to you, and evidence your verdict is in favor of Gilbert and against the railroad company it will be your duty to assess Gilbert's damages and write the amount of your finding for him into the verdict.

In arriving at the amount of damages that you should award Gilbert, if your verdict is for him, you must fully and fairly compensate him for such loss, if any, as the injury has caused him and then, if he was guilty of any contributory negligence, the amount of damages shall be diminished by the jury in propor- [238] tion to the amount of negligence attributable to Gilbert. In determining the amount of damages without *diminishment,* and in this case the evidence may convince you that there should be no *diminishment,* if your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present or will, with reasonable probability, exist in the future, you should allow for any loss of capacity to earn money caused by the injuries whether past,

present or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss, as determining what amount would be required to buy an annuity for life equal to the loss with some responsible life insurance company.

Gilbert has sued for $25,000.00. This sum claimed must not be to you any criterion of the amount of your verdict, if for him, but your verdict must not be in any event in excess of $25,000.00.

In this court no verdict can be reached unless all twelve of the jury agree on it.

4.

You are charged gentlemen of the jury that evidence is to be estimated not only by its intrinsic weight but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore

That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was [239] within the power of the party, the evidence offered should be viewed with distrust. It appears that soon after young

Gilbert was injured pieces broken from this fan in evidence were collected by servants of the railroad, and delivered to one Leslie Neumen, a claim agent of the railroad, who was said by a witness for the railroad to have been present in court here during this trial; those pieces have not been presented in evidence for your inspection, the statement was made by one of defendant's witnesses that they would not be presented in evidence; you may draw your own conclusions from such conduct, as to whether those pieces of the fan if shown to you would have convinced you that some contention of the railroad defendant was false, or convinced you that statements of plaintiff Gilbert were confirmed by physical facts.

6.

You are charged gentlemen of the jury that an ordinary man of 20 years of age in the north temperate zone of America, according to the American Mortality Tables has an expectancy that he will live more than forty years.

The COURT: At the request of the parties the pleadings are given to the jury. Let the record show that by agreement of the parties and at their request in open court, the Clerk is authorized and directed to see that the exhibits in the case are delivered to the jury in their jury-room.

(Thereupon, the jury retired to consider of their verdict, and subsequently returned into court their verdict in favor of the plaintiff and against the defendant, [240] which verdict is in words and figures as follows:)

[Title of Court and Cause.]

VERDICT

We, the jury in the above entitled cause find our verdict in favor of the plaintiff, Clifford Gilbert, and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty Five Hundred (3500.00) Dollars.

(Signed) George Priest
Foreman of the Jury

(Filed October 1, 1935)

[Title of Court and Cause.]

JUDGMENT

This cause and action came regularly on for trial on the 27th, 28th, and 30th days of September, A. D. 1935, before the Court sitting with a jury, the plaintiff appearing in person and by his attorneys, H. L. Maury, Esq. and T. J. Davis, and the defendant appearing by its attorneys, William Murphy, Esq., and J. C. Garlington, Esq.

Witnesses on the part of the plaintiff and defendant were sworn and on completion of the plaintiff's proof and after plaintiff had rested, the defendant submitted evidence in its defense, and at the close of all the evidence and after both parties, to-wit: Clifford Gilbert and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, an-

nounced in open court that they and each of them rested, the Court instructed the jury. Thereupon the cause and evidence was argued by the attorneys for the respective parties and at the close of said arguments the jury retired to consider its verdict, and subsequently returned [241] into open court with its verdict, which said verdict, after the title of the court and cause, was and is in the following words and figures, to-wit:

[After Title of Court and Cause.]

"We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we assess plaintiff's damages in the sum of $3500.00.

George Priest
Foreman of the Jury."

Now, therefore, by reason of the premises aforesaid, and by virtue of the law, it is ordered, adjudged and decreed, and this does order, adjudge and decree, that the plaintiff, Clifford Gilbert, have and recover of and from the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the sum of Three Thousand, Five Hundred Dollars ($3,500.00), together with plaintiff's costs necessarily expended in this action amounting to the sum of Sixty & 60/100 Dollars ($60 60/100).

Dated and entered this 5th day of October, A. D. 1935.

(Signed) C. R. GARLOW,
Clerk.

The Court having, on the 2nd day of October, 1935, by an order duly made and entered herein, granted defendant herein to and including the 30th day of October, 1935, within which to prepare, serve and file its Bill of Exceptions herein;

Now, on this day, and within the time allowed and granted by order of said Court, comes the defendant and presents this, its proposed Bill of Exceptions, and asks that the same be signed, settled and allowed as true and correct. [242]

Dated this 24th day of October, 1935.

MURPHY & WHITLOCK
R. F. GAINES
Attorneys for Defendant.

Service of the within and foregoing Bill of Exceptions by acceptance of a true copy thereof is acknowledged on this 24th day of October, 1935.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

The undersigned Judge who tried the above-entitled cause hereby certifies that the above and foregoing, by him corrected, is a full, true and correct Bill of Exceptions in said cause and contains all the evidence introduced, proceedings had, and exceptions taken at the trial of said cause, and the

same is accordingly signed, settled and allowed, and ordered filed this, the 3rd day of January, 1936.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Lodged in Clerk's office Oct. 29, 1935, and Filed Jan. 3, 1936. C. R. Garlow, Clerk. [243]

Thereafter, on January 3, 1936, Petition for Appeal was duly filed herein, in the words and figures following, to wit: [244]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the defendant above named, and petitions this court for an appeal herein, and respectfully shows:

I.

That this is an action for damages for personal injury alleged to have resulted to the plaintiff Clifford Gilbert on the 30th day of October, 1933, at which time he is alleged to have been employed by the defendant in intrastate commerce, it being alleged that said injury was due to the negligence of the defendant in the particulars set forth in the plaintiff's complaint. That said action came on for trial in the above named court before the court sitting with a jury. After the introduction of the evidence, the argument of counsel, and the instruc-

tions of the court, the jury returned its verdict in favor of the plaintiff and against the defendant, and judgment upon said verdict was entered in the above named court on the 5th day of October, 1935, said judgment being in the sum [245] of Thirty-five Hundred Dollars ($3500.00), together with plaintiff's costs, taxed at the sum of $60.60.

II.

That the above named defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, feeling aggrieved by the said judgment and the proceedings had prior thereto in said cause, desires to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the reasons and grounds for its said appeal are set forth in its assignment of errors filed herewith, all of which said errors were committed in said cause to the prejudice of the defendant.

Wherefore, defendant prays that its appeal be allowed to the Circuit Court of Appeals, for the Ninth Circuit, for the correction of said errors so complained of, and that citation on appeal be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered, duly authenticated, be sent to the said Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

The defendant further prays that the amount of the bond required by law to be furnished by the defendant upon such appeal for the payment of costs, be fixed by the court, and that said cause may be reviewed and determined, and said judgment and every part thereof reversed, set aside, and held for naught; and for such further relief or remedy in the premises as the court may deem appropriate.

Dated this 3rd day of January, 1936.

R. F. GAINES
Butte, Montana,
MURPHY & WHITLOCK and
J. C. GARLINGTON
Missoula, Montana
Attorneys for Defendant. [246]

State of Montana,
County of Missoula.—ss.

W. L. Murphy being first duly sworn on oath deposes and says: that he is one of the attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the defendant named in the foregoing action; that he makes this verification for and on behalf of said defendant for the reason that it is a corporation and has no officer within said county where affiant resides. That affiant has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. L. MURPHY

Subscribed and sworn to before me this 3rd day of January, 1936.

[Seal] LILIAN C. WENZEL

Notary Public for the State of Montana. Residing at Missoula, Montana.

My Commission expires Feb. 10th, 1936.

Service of the foregoing Petition accepted and receipt of copy thereof acknowledged this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [247]

Thereafter, on January 3, 1936, Assignment of Errors was duly filed herein, in the words and figures following, to wit: [248]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant above named and makes and files the following assignments of error upon which it will rely in the prosecution of its appeal from the judgment made and entered in the above entitled cause on the 5th day of October, 1935.

1.

The court erred in overruling defendant's motion for a directed verdict made at the conclusion of the testimony.

2.

The court erred in holding that there was any evidence sufficient to go to the jury of negligence upon the part of the defendant in the particulars alleged in the plaintiff's complaint, or at all.

3.

The court erred in holding that there was any evidence sufficient to go to the jury tending to show that any negligence on the part of the defendant was the proximate cause of the [249] plaintiff's injury.

4.

The court erred in holding that there was any evidence sufficient to justify a verdict or support a judgment in favor of the plaintiff and against the defendant.

5.

The court erred in holding that the evidence was sufficient to establish any violation of duty owing from the defendant to the plaintiff.

6.

The court erred in holding that the evidence was sufficient to establish notice to or knowledge of the defendant of the defective condition of the particular instrumentality which is alleged in the plain-

tiff's complaint to have given away or failed and caused the injury to the plaintiff, and that by the exercise of ordinary care the defendant could have discovered the same.

7.

The court erred in holding that the evidence was insufficient to establish that the injury suffered by the plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, and that the plaintiff and his guardian ad litem had full knowledge of the condition and particularly of the defects, if any, of the truck described in the complaint, the danger and risk from all of which was assumed by the plaintiff and his guardian ad litem.

8.

The court erred in holding that there was no fatal variance between the allegations of the plaintiff's complaint [250] and the evidence introduced in support thereof.

9.

The court erred in overruling defendant's objection to the introduction of any evidence in the case upon the ground that the complaint does not allege facts sufficient to constitute a cause of action.

10.

The court erred in overruling the defendant's objection to evidence tending to show the condition of parts of the truck described in the com-

plaint other than the condition of the fan upon said truck, the evidence admitted over the defendant's objection being in substance that the truck was very old, that the fan belt was breaking quite often, that the bearing in the fly-wheel on which the fan belt ran was loose and wobbled, and had a tendency to jump and break the belt on various occasions, that the truck would not start and had to be towed or allowed to run down a hillside, that the radiator boiled whenever the truck was driven more than four or five blocks, that the machinery rotating the fan made a kind of grinding or knocking noise, and that the engine of the truck missed fire. The defendant's objection to said evidence was that the same did not tend to prove the allegations of the complaint as to the specific manner in which the plaintiff received his injury.

11.

The court erred in overruling the defendant's objection to the question asked of the witness C. L. Stubbs on re-direct examination, which question, together with the answer thereto, is as follows: [251]

"Q. What happened in the case of the steel fan to which Mr. Garlington directed your attention?

Mr. MURPHY: I object to it as being entirely immaterial and having no probative force.

A. The fan blade broke off and drove it right through the hood."

12.

The court erred in denying the defendant's offer of proof, which is as follows:

"Defendant offers to prove by defendant's witness Schurman that the defendant operated under certain promulgated safety rules for its employees, and that at the time the truck was received by the defendant from the city of Deer Lodge one of said rules provided:

" 'Don't use tools, appliances or machinery unless they are in safe condition for the work intended, and unless you are familiar with their use.' "

"That when Albert Schurman was assigned to operate said truck one of the conditions of his employment and one of the circumstances under which said truck was operated was that any unsafe condition of the truck for the work intended should result in his ceasing to use it and reporting it to his superiors."

13.

The court erred in overruling defendant's objection to Exhibit 9, consisting of the fan belt, described in the complaint, the objection being that no action of the belt and no condition of it was in any manner connected with or contributed to the injury complained of.

14.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or

in substance in accordance with the following instruction which the defendant requested the court to give to the jury: [252]

"(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendant's behalf."

15.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said

truck, your verdict should be for the defendant."

16.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(7) It is admitted in this case that the plaintiff just prior to and at the time of the accident had full control, care and management of the entire automobile truck which is alleged to have caused his injury, and if you believe that the accident arose out of and was proximately caused by the method or manner adopted by him in making adjustments in the motor thereof, or by his negligence or inattention in any respect, and not by the negligence of the defendant as charged, you shall render a verdict in favor of the defendant." [253]

17.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(8) If an employee chooses the more dangerous of the two ways to perform a certain act, he assumes the risk of injury therefrom. Therefore, if you find from the evidence that

the plaintiff could have corrected the condition of the fourth pet-cock on the truck without keeping the motor running, and that it was more dangerous to adjust the same while the motor was running, your verdict should be for the defendant."

18.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant."

19.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(10) Where an employee receives for use a defective appliance and with knowledge of

the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used." [254]

20.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(11) Therefore if you find from a preponderance of the evidence that the defendant furnished to the plaintiff a truck in a defective condition, which increased the hazard incident to its use, and the plaintiff was aware of the condition of increased hazard thus brought about, or such condition was so obvious that an ordinarily prudent person of the plaintiff's mechanical skill and personal knowledge and experience with the truck would have observed and appreciated the condition, the plaintiff must be held to have assumed the risk of injury and your verdict must be for the defendant."

21.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(13) The statement in these instructions that the plaintiff must have known and appreciated the danger means simply that he must have known the condition from which the danger arose. Appreciation of danger is conclusively presumed from knowledge of the conditions even though the plaintiff has testified that he did not in fact appreciate the danger. An employee cannot claim ignorance of a hazard which would be obvious to a reasonable and prudent person under the same circumstances."

22.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury: [255]

"(14) One whose duty it is to operate a certain machine is held to a stricter rule of assumption of risk in connection therewith than an employee who has no such duty to operate the machine."

23.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(15) You are instructed that you shall disregard any testimony which you find to

be in conflict with physical facts or the law of nature."

24.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury."

25.

The court erred in his instruction to the jury with reference to whether the injury was proximately caused by some act or omission of the defendant, the particular portion of the charge being as follows:

"Now the test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence of the act or omission, if any, of the defendant or its agent. Now, this does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position [256]

where he sat in driving the truck and get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of a railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing."

Exception was taken to the charge as follows:

"The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and

four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan."

The COURT: The exception is overruled. You may have an exception."

26.

The court erred in his instruction to the jury with reference to the inclusion of loss or earning capacity in the measure of damage for plaintiff's injury, the particular portion of the charge being as follows: [257]

"If your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn money caused by the injuries, whether past, present, or with reasonable probability will exist in the future. In this connection you may consider his ex-

pectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as determining what amount would be required to buy an annuity for life, equal to the loss, with some responsible life insurance company. * * * You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperature zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years."

Exception was taken to the charge as follows:

"The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy of life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement

between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

* * * * * * *

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an ex- [258] ception, and that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious where a man has lost the third finger of his right hand and has practically lost the little finger (it is a cumbrance rather than a help) that the jury may consider the reduction in his earning capacity They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: This is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts are for you, and the law is for me."

WHEREFORE, the defendant prays that said judgment be reversed and said action finally dismissed.

R. F. GAINES
MURPHY & WHITLOCK &
J. C. GARLINGTON,
Attorneys for Defendant.

Copy of the above Assignment of Errors received, and service thereof acknowledged this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS,
Attys for Pltff.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [259]

Thereafter, on January 3, 1936, Order Allowing Appeal was duly filed and entered herein, in the words and figures following to wit: [260]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

The defendant in the above entitled action having heretofore served and filed its petition for an order allowing its appeal from the judgment in said action, and having served and filed its assignment of errors committed therein, and the court now being fully advised with respect thereto;

IT IS ORDERED, that the appeal of said defendant in the above entitled action from the judgment heretofore made, given and entered therein on the 5th day of October, 1935, in favor of the plaintiff and against the defendant, be allowed as prayed for in defendant's petition for appeal filed herein, upon the defendant furnishing good and sufficient security according to law, in the sum of $1000.00, conditioned that said defendant shall prosecute its said appeal to effect and answer all costs if it fail to make its plea good.

DATED this 3rd day of January, 1936.

JAMES H. BALDWIN,
United States District Judge,
for the District of Montana.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [261]

Thereafter, on January 3, 1936, Bond on Appeal was duly approved and filed herein, in the words and figures following to wit: [262]

[Title of Court and Cause.]

UNDERTAKING

WHEREAS, the defendant in the above entitled action has petitioned the above named court for an order allowing its appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from that certain judgment entered in the above entitled action on the 5th day of October, 1935, in favor of the plaintiff and against the defendant therein for the sum of $3500.00; and

WHEREAS, the above named court has by its order duly given, made and entered, allowed the said appeal of the defendant upon its furnishing good and sufficient security in the sum of $1000.00 that it, as said appellant, shall prosecute its appeal to effect, and if it fail to make its plea good, shall answer all costs;

NOW, THEREFORE, the undersigned, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, allowed to become surety under and by virtue of the laws of the United States and of the State of Montana upon bonds and undertakings, in consideration of the premises and of the aforesaid appeal, [263] does hereby jointly and severally undertake in the sum of $1000.00, and promise to the effect that said defendant as said appellant will prosecute its appeal in the above

entitled action to effect and, if it fail to make its plea good, shall answer all costs only, not exceeding the said sum of $1000.00.

The undersigned hereby expressly agrees that in case of any breach of any condition of this undertaking the above named court may upon notice to the undersigned of not less than ten (10) days, proceed summarily in the above entitled action in which this undertaking is given, to ascertain the amount which the undersigned as surety upon this undertaking is bound to pay on account of such breach thereof by the defendant, and render judgment therefor against the undersigned and award execution therefor.

IN WITNESS WHEREOF, said corporation has hereunto caused its name to be subscribed and its seal to be affixed by its agent thereunto duly authorized, this 3rd day of January, 1936.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By OSCAR CRUTCHFIELD

Its Attorney in Fact

The foregoing undertaking is approved this 3rd day of Jan. 1936.

JAMES H. BALDWIN,

District Judge.

[Endorsed]: Filed Jan. 3, 1936, C. R. Garlow, Clerk. [264]

Thereafter, on January 3, 1936, Order for Transmission of Original Exhibits to Appellate Court was duly filed and entered herein, in the words and figures following to wit: [265]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

Upon application of counsel for the defendant in the above entitled action, IT IS HEREBY ORDERED that in connection with the appeal of the said defendant to the United States Circuit Court of Appeals for the Ninth Circuit, all original exhibits introduced in evidence in said cause may be transmitted to the said Appellate Court for its inspection.

DATED: January 3rd, 1936.

JAMES H. BALDWIN,
Judge United States District
Court, District of Montana.

[Endorsed]: Filed Jan. 3, 1936, C. R. Garlow, Clerk. [266]

Thereafter, on January 3rd, 1936, Citation on Appeal was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [267]

[Title of Court and Cause.]

CITATION

UNITED STATES OF AMERICA, to CLIFFORD GILBERT, Plaintiff Above Named, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, California, within thirty days from the date hereof, pursuant to an order filed and entered in the office of the Clerk of the District Court of the United States, for the District of Montana, allowing an appeal from a judgment filed and entered in said court on the 5th day of October, 1935, in favor of the plaintiff and against the defendant in the above entitled action, being at law No. 1622, wherein you are the plaintiff and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, is defendant, to show cause, if any there be, why the judgment rendered against the said defendant as in said appeal mentioned, should not be reversed and corrected and why justice should [268] not be done the parties in that behalf.

DATED: January 3rd, 1936.

JAMES H. BALDWIN,
United States District Judge
for the District of Montana.

Service of the foregoing Citation accepted and receipt of copy thereof acknowledged, this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed Jan 3, 1936. [269]

Thereafter, on January 11th, 1936, Praecipe for Transcript of Record was duly filed herein, in the words and figures following, to wit: [271]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO C. R. GARLOW, Clerk of the Above Entitled Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled cause on the 5th day of October, 1935, in favor of the plaintiff and against the defendant, and include therein the following:

The judgment-roll consisting of:

The Complaint.
Demurrer to the Complaint.
Order overruling the Demurrer.
Answer of the defendant as amended.
Reply of the Plaintiff.

Minute entries of the cause on trial.

The Verdict of the Jury.

Order of October 2nd, 1935, allowing thirty days additional time to prepare bill of exceptions.

The Judgment.

Also, the bill of exceptions as settled, allowed and filed.

Also,

Defendant's petition for appeal.

Assignment of errors.

Order allowing appeal.

Bond on appeal. [272]

Order authorizing original exhibits to be transmitted to Appellate Court, and

Original Citation on Appeal.

This Praecipe.

Your Certificate to said Transcript.

You will also please forward with said transcript the original exhibits introduced in evidence in the trial of said cause duly certified by you.

Dated January 7th, 1936.

R. F. GAINES
MURPHY & WHITLOCK &
J. C. GARLINGTON
Attorneys for Defendant.

Service of the foregoing Praecipe accepted and receipt of copy acknowledged this 9th day of January, 1936.

L. C. MYERS,
T. J. DAVIS,
Attorneys for Plaintiff.

[Endorsed]: Filed January 11th, 1936. C. R. GARLOW, Clerk. [273]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing 2 volumes, consisting of 273 pages, numbered consecutively from 1 to 273 inclusive, is a full, true and correct transcript of the record and proceedings, called for by praecipe, in case No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have incorporated into said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the said transcript of record amount to the sum of Forty-six and 45/100 Dollars ($46.45), and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this January 24th, A. D. 1936.

[Seal] C. R. GARLOW,
Clerk. [274]

[Endorsed]: No. 8115. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant, vs. Clifford Gilbert, Appellee. Vol. I. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed January 27, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.